FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 1981 TO JUNE 30, 1981

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MEMBERS OF THE FEDERAL TRADE COMMISSION AS OF JUNE 30, 1981

DAVID A. CLANTON, *Acting Chairman*[1]
Took oath of office August 26, 1976

MICHAEL PERTSCHUK, *Commissioner*
Took oath of office April 21, 1977

PAUL RAND DIXON, *Commissioner*
Took oath of office March 21, 1961

ROBERT PITOFSKY, *Commissioner*[2]
Took oath of office June 29, 1978

PATRICIA P. BAILEY, *Commissioner*
Took oath of office October 29, 1979

CAROL M. THOMAS, *Secretary*
Appointed June 20, 1977

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[1]Appointed March 4, 1981.
[2]Resigned April 30, 1981.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

In the Matter of

LITTON INDUSTRIES, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9123. Complaint, Jan. 31, 1979—Final Order, Jan. 5, 1981

This order requires, among other things, a Beverly Hills, Calif. firm, engaged in the manufacture, sale, distribution and advertising of various products, to cease making any unsubstantiated representations regarding the performance, characteristics, or benefit of any microwave oven; or its superiority over competing products. Further, the company must cease failing to maintain, for three years, accurate records of all materials, test reports, studies and surveys relating to any such representation. Additionally, the order prohibits the company from misrepresenting the purpose, content, reliability or conclusions of a test or survey; and advertising the results of any such survey, unless respondents in the survey are representative of the group referred to in the ads.

Appearances

For the Commission: *Robert L. Barton, Jr., Ronald E. Bogard, Carol Jennings* and *Julie K. Niemasik.*

For the respondent: *J. Wallace Adair, Howrey & Simon,* Washington, D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Litton Industries, Inc., a corporation (hereafter "Respondent" or "Litton"), has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Litton Industries, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the

State of Delaware, with its executive office and principal place of business located at 360 North Crescent Drive, Beverly Hills, California. Litton's Microwave Cooking Products Division is located at 1405 Xenium Lane North, Minneapolis, Minnesota.

PAR. 2. Litton is now, and for some time in the past has been, engaged in the manufacture, distribution, advertising, and sale of various products including microwave ovens.

PAR. 3. Respondent Litton causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent Litton maintains, and at all times mentioned herein has maintained, a course of trade in said products in and affecting commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of said business, Litton has disseminated and caused the dissemination of advertisements for microwave ovens manufactured by Litton, by various means in or affecting commerce, including magazines and [2]newspapers distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said microwave ovens.

PAR. 5. Typical and illustrative of the advertisements so disseminated or caused to be disseminated by Litton are the advertisements attached as Exhibits A, B, C and D, designated as the "initial consumer microwave independent technician survey advertisement," the "revised consumer microwave independent technician survey advertisement," the "initial commercial microwave independent technician survey advertisement," and the "revised commercial microwave independent technician survey advertisement," respectively.

PAR. 6. In Exhibit A, the "initial consumer microwave independent technician survey advertisement," printed in the *Wall Street Journal,* October 25 and December 13, 1976, and elsewhere, and in Exhibit B, the "revised consumer microwave independent technician survey advertisement," printed in *HFD Retailing Home Furnishings,* August 22, 1977, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. The majority of independent microwave oven service technicians would recommend Litton to a friend.

2. The majority of independent microwave oven service technicians are of the opinion that Litton microwave ovens are the easiest to repair of all microwave oven brands.

3. The majority of independent microwave oven service technicians are of the opinion that Litton microwave ovens are superior in quality to all other microwave oven brands.

4. The majority of independent microwave oven service technicians are of the opinion that Litton microwave ovens require the fewest repairs of all microwave oven brands.

5. The majority of independent microwave oven service technicians have Litton microwave ovens in their homes.

6. Representations 1–5 were proved by a survey independently conducted by Custom Research Inc., in June 1976.

PAR. 7. In Exhibit C, the "initial commercial microwave independent technician survey advertisement," printed in *Hospitality (Restaurant),* November 1976, and elsewhere, and in Exhibit D, the "revised commercial microwave independent technician survey advertisement," printed in *Restaurant Business,* September 1977, and elsewhere, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that: [3]

1. The majority of independent microwave oven service technicians would recommend Litton to their customers.

2. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are superior in quality to all other microwave oven brands.

3. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are the easiest to repair on location of all microwave oven brands.

4. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.

5. The majority of independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

6. Representations 1–5 were proved by an April 1976 survey independently conducted by Custom Research, Inc.

In addition, in Exhibit C, Litton has represented, directly or by implication, that Litton is the best commercial microwave oven buy and that this representation was proved by the above-referenced survey.

PAR. 8. In Exhibits A and B, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. Litton microwave ovens are superior in quality to all other microwave oven brands.
2. Litton microwave ovens are the easiest to repair of all microwave oven brands.
3. Litton microwave ovens require the fewest repairs of all microwave oven brands.

PAR. 9. In Exhibits C and D, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. Litton commercial microwave ovens are superior in quality to all other microwave oven brands. [4]
2. Litton commercial microwave ovens are the easiest to repair on location of all microwave oven brands.
3. Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.
4. Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

PAR. 10. In truth and in fact, the April and June 1976 technician surveys conducted for Litton by Custom Research, Inc., do not prove the representations listed in Paragraphs Six and Seven, for reasons including but not limited to the following:

(a) The survey respondents were drawn exclusively from the list of Litton authorized microwave oven service agents. As such the sample surveyed was not representative of the population of independent microwave oven service technicians and the surveys were biased.

(b) The surveys failed to establish that the survey respondents possessed sufficient expertise with either (1) microwave ovens or (2) competitive brands of microwave ovens to qualify as respondents for a microwave oven comparative brand survey.

(c) In some paired comparisons, the results lacked statistical significance because the base number was too small.

(d) The surveys conducted for Litton by Custom Research, Inc., were not in fact independent surveys. The surveys were designed and analyzed by Litton employees. The role of Custom Research was limited to placing the telephone calls, from a list of names supplied by Litton, and conducting the interviews, from a questionnaire supplied by Litton.

For the above reasons, representation 6 in Paragraphs Six and

Seven is false. Therefore, representation 6, contained in Exhibits A, B, C and D, was, and is, deceptive and unfair.

PAR. 11. In Exhibits A, B, C and D, and other advertisements substantially similar thereto, Litton has represented, directly or by implication, that it had a reasonable basis of support for the representations contained in those advertisements, at the time those representations were made. In truth and in fact, for the reasons enumerated in Paragraph Ten, Litton had no reasonable basis of support for the representations listed in Paragraphs Six, Seven, Eight and Nine, at the time those representations were made. Therefore, the representations listed in Paragraphs Six, Seven, Eight and Nine were, and are, deceptive and unfair. [5]

PAR. 12. In the course and conduct of the aforesaid business, and at all times mentioned herein, Litton has been and is now in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of microwave ovens of the same general kind and nature as those sold by Litton.

PAR. 13. The use by Litton of the aforesaid unfair and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of microwave ovens manufactured by Litton.

PAR. 14. The aforesaid acts and practices of Litton, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

[illegible] the Gremlin [illegible] the biggest [illegible] traffic of the year and other [illegible] said the [illegible] company's trucks, [illegible] and Jeeps were still profitable but clearly AMC was [illegible] again. "We have [illegible] costs and [illegible] action to reduce fixed costs and [illegible] break-even [point], thus [illegible] American Motors to work through a [illegible] period," said chairman Roy D. Chapin Jr. and president William V. [illegible] in a [illegible] statement [illegible]

[illegible] the [illegible] in small car sales does not fully explain the industry-wide lag. Some analysts and auto executives say the Ford strike may have deferred buyers [illegible] Other [illegible] the [illegible] long [illegible] trucks [illegible] to [illegible] all [illegible] prices of about $[illegible] a car, combined with uncertainty over the economy, has put off many would-be buyers.

[illegible] the reasons, some analysts are scaling back their estimates of sales for the current model year—in some cases from as much as 11.3 million vehicles to as low as 10.5 million. Such a decline would hurt [illegible] serious, but [illegible] one of the [illegible] optimistic [illegible] the economy [illegible] Carter [illegible] recovery.

[illegible]

ISRAEL:

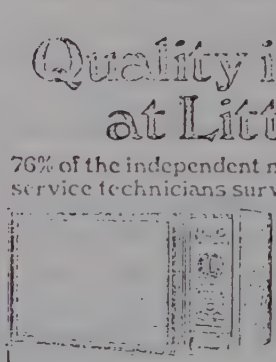
The Economic Enemy

[illegible] for the [illegible] problems with [illegible] inflation—and [illegible] A forward [illegible] Prime Minister Yitzhak [illegible] by 45 percent. The [illegible] was the country's worst [illegible] in years. Well over 70,000 Israelis had stopped working or threatened to strike in protest. And the government, which has been pushing an austerity program to slow Israel's 35 per cent inflation rate and whittle a $2 billion trade deficit, seemed unable to calm things down.

Israel's economic woes date to the 1973 Yom Kippur war and the Arab oil embargo and worldwide stagflation that followed. Net oil dollars $2.36 million-a-year oil bill triple, but inflation sent [illegible] in imports of all kinds soaring from $[illegible] billion in 1973 to $5.6 billion in each of the next two years. At the same time, the global slump dried up markets for Israel's traditional exports—mainly textiles, processed food and chemicals. Finally, the Israeli military had to make up for the losses it suffered during the Yom

Quality is No. 1 at Litton!

76% of the independent microwave oven service technicians surveyed recommend Litton.



Litton leads all brands.

INFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS SERVICING THOSE BRANDS				AVERAGE PERFORMANCE FOR LITTON VS. ALL COMPETITIONS (weighted average)
Brand To Brand	Litton vs GE	Litton vs Amana	Litton vs Major Brand	
Which Microwave Oven Brand would you recommend to a friend?	59% vs. 23%	66% vs. 18%	81% vs 1%	76% vs. 8%
Which Microwave Oven Brand is [illegible]?	66% vs. 5%	[illegible] vs 8%	71% vs 0%	72% vs. 4%
Which Microwave Oven Brand is the best quality?	48% vs. 16%	50% vs. 16%	69% vs 1%	63% vs. 9%
Which Microwave Oven Brand requires fewest repairs?	38% vs. 22%	40% vs 24%	50% vs 3%	53% vs. 12%
Which Microwave Oven Brand do you have in your home?	48% vs. 19%	50% vs 18%	70% vs. 5%	67% vs. 10%

Among independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those surveyed said they would recommend Litton to a friend. And an average of 63% identified Litton brand ovens as having the best quality.

You'll find it in our full line of advanced countertop microwave ovens, double-oven and combination microwave ranges.

And in such Litton features as Vari-Cook® oven control, Vari-Temp® automatic temperature control and new Memorymatic™ microwave program cooking. Innovative ways to microwave more foods better.

Need any more reasons to buy Litton? Ask your Litton dealer for a microwave cooking demonstration. For his name and number, call us right now, toll free 800-328-7777.

LITTON
Microwave Cooking

Litton... changing the way America Cooks.

EXHIBIT A

EXHIBIT 3

Quality is No. 1 at Litton!

73% of the microwave oven service technicians surveyed* would recommend Litton.

Among [illegible] and [illegible] of these surveyed said they would [illegible] Litton to a friend. Survey respondents were 234 technicians who work for independent [illegible] agencies, trained to service Litton [illegible] and who [illegible] at least one [illegible] Litton [illegible]

And 61% of [illegible] Litton brand ovens [illegible]

That's [illegible] ity to be your [illegible] the best microwave oven [illegible]

You'll find [illegible] our full line of advanced counter[illegible] double-oven and combination [illegible] ranges. And in such Litton features as [illegible] Cook® oven control, Van Temp® automatic temperature control and Memorymatic® [illegible] cooking [illegible] vative ways to [illegible]

Need any [illegible] a Litton microwave cooking demonstration today!

LITTON

Litton. [illegible] Microwave Cooking.

73 retailing home furnishings, August 22, 197[illegible] on 1

Litton is the best commercial microwave oven buy.

Nov 15, 1976

80% of the independent microwave oven service technicians surveyed recommend Litton to their customers.

When technicians servicing Litton and competitive brands were asked in an independent survey* which microwave oven they'd recommend to prospective customers, 80% said "Litton." An overwhelming preference over major competitive brands like Amana and Sharp.

These experienced servicemen prefer Litton over other brands for many reasons.

That's what we've been saying all along.

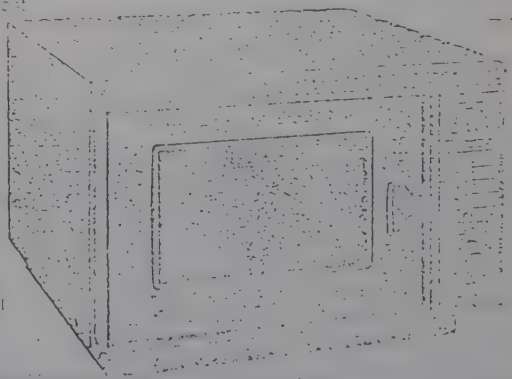
Litton offers a full line of the most advanced microwave oven systems. From 800 to [illegible] watts. With such innovative features as the new Vari-Power™ control, Push Button solid state timer, Automatic Defrost, Intrusion-[illegible] Accessories, chef[illegible] Dual-[illegible] for ad[illegible] able [illegible] Power Supply, [illegible]

And each oven comes with the total support of the Litton System's Masters Engineers, Food Applications Chefs, Sales and Service representatives who can help increase profits and maximize [illegible]

Take the word of your independent [illegible] man, Litton is the best commercial microwave oven you can buy.

	Litton vs All Brands Combined	Litton vs Amana	Litton vs Sharp
Best quality	[illegible]	[illegible] vs 10%	8[illegible]% vs 6%
Requires fewest repairs	75% vs 14%	70% vs 3%	70% vs 11%
Least likely to [illegible] in use [illegible] over [illegible]	69% vs 20%	65% vs 15%	6[illegible]% vs 13%

[illegible]



Litton...
changing the way
America Cooks.

EXHIBIT [illegible]

Name
Title
Firm
Business address
City
Telephone
Area code
Telephone number

State Zip

LITTON

*80% of [illegible] 15, 1976

For [illegible]

For [illegible]

OCT 1977

79% of microwave service technicians surveyed say Litton is the best quality commercial microwave oven.

80% would recommend Litton to their customers.

[illegible]

Among [illegible] Litton and competitive [illegible] kind of [illegible] of [illegible] U.S. [illegible] as Amana and Sharp. Survey results were 211 technicians who work for independent service companies actively recommend Litton commercial microwave ovens and who service all leading other brands.

There are [illegible] technicians obviously prefer Litton over other brands for many reasons. And Litton quality is certainly one of them.

Litton offers a full line of the most advanced microwave ovens. From 600 to 2000 watts. With such unique features as new VariPower™ control. Pushbutton solid state timers. Automatic control. Intrusion-proof doors. Advanced cooking and sealed-tube design. Durable [illegible] and other built-in added safety. And dependable Litton Advance Power Supply System.

And each oven comes with the total support of the Litton System Masters, Engineers, Food Applications Chefs, Sales and Service representatives who can help increase profits and maximize efficiency.

Follow the preference expressed by the microwave service technicians surveyed. 79% of whom said Litton is the best quality commercial microwave oven.

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Initial Decision by John J. Mathias, Administrative Law Judge

June 6, 1980

Preliminary Statement

The original Complaint in this matter was filed on February 1, 1979, and charged Litton Industries, Inc., a large conglomerate manufacturer and seller of various high technology products for industrial, commercial, and governmental use, with using "unfair and deceptive statements" (Complaint, Paragraph Thirteen) in advertisements for the sale of microwave ovens produced by its Litton Microwave Cooking Products ("LMCP") Division in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The Complaint was amended on April 16, 1979 to include as a respondent Litton Systems, Inc. (a wholly-owned subsidiary of Litton Industries, Inc.). Litton Microwave Cooking Products was, during the time covered by the [2]Complaint, a division of Litton Systems, Inc., rather than a direct division of Litton Industries, Inc.

The gravamen of the charges against respondents is that certain advertisements published by respondents and their dealers purported to show that independent microwave oven service technicians preferred Litton ovens in certain respects and that such preferences were revealed by surveys conducted of such independent technicians, whereas, in truth and in fact, the advertisements were "deceptive" because the underlying surveys did not provide a "reasonable basis" for the claims made.

In 1976, LMCP devised two surveys of microwave oven service agencies named on its own two lists of authorized service agencies—the commercial list of those authorized to service Litton's commercial ovens and the consumer list of those authorized to service its consumer ovens. The surveys were then conducted for it by an independent research organization. Originally, the surveys were intended for internal use only. Advertisements based thereon had not been planned. After having tabulated the results of the surveys for these internal purposes, executives of Litton decided to incorporate the results into advertising (Tr. 2023, 2035). The survey results were then published in two separate advertising campaigns, utilizing primarily newspapers, magazines and trade journals during 1976 and 1977. Appendices A, B, and D, are examples of advertisements Litton published in the first campaign.

Upon objections by Federal Trade Commission staff members to some of its claims, Litton revised the advertisements in 1977 to more

fully describe the nature of their survey (See Appendices C, and E), but subsequently discontinued the survey campaign upon further objections by staff members of the Federal Trade Commission.

In addition to advertising placed directly by Litton, retailers and distributors also engaged in newspaper radio advertising of the survey results. Some of this advertising was paid for, in whole or in part, by Litton (the "cooperative advertising program"). Appendices F through K are examples of advertisements placed by retailers and distributors. Appendices H through K were part of the cooperative program.

The principal issues presented for trial were:

(1) Did LMCP disseminate and cause to be disseminated challenged advertisements in commerce?

(2) What representations did LMCP in fact make?

(3) Did LMCP have a reasonable basis for making such claims? [3]

(4) Were the advertisements false and misleading in any respect?

(5) Should the parent corporation Litton Industries, Inc. be held responsible for the acts of the LMCP division of its subsidiary Litton Systems, Inc.?

(6) What is the proper scope of the order, if any, to be issued?

The hearing on the case-in-chief commenced on September 17, 1979 and was concluded on October 5. After additional discovery by complaint counsel, respondents' defense case was presented between November 5 and November 21, 1979. Rebuttal and surrebuttal hearings were held on January 21 and 22, 1980. The record was closed on March 7, 1980. In total, nine witnesses testified on behalf of complaint counsel and 258 Commission exhibits were introduced into evidence. An additional nine witnesses testified on behalf of the respondents and 37 respondent exhibits were introduced into evidence. The hearings consumed a total of 27 trial days and 4633 pages of transcript.

This initial decision is based upon the entire record including proposed findings of fact and conclusions of law and supporting memoranda filed by the parties, as well as their replies. I have also taken into account my observation of the witnesses who appeared before me and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do

not necessarily represent complete summaries of the evidence supporting each finding. The following abbreviations have been used:

Tr. - Transcript, preceded by the name of witness and followed by the page number.
CX - Complaint Counsel's Exhibit, followed by its number and the referenced page(s).
RX - Respondents' Exhibit followed by its number and the referenced page(s).
CPF - Complaint Counsel's Proposed Findings. [4]
CPFM - Memorandum in Support of Complaint Counsel's Proposed Findings.
RPF - Respondents' Proposed Findings.
CRB - Complaint Counsel's Reply Brief.
RRB - Respondents' Reply Brief.
LMCP - Litton Microwave Cooking Products, a division of Litton Systems, Inc.
Litton - As used herein refers to LMCP.

Findings of Fact

I. THE RESPONDENTS

1. Litton Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 360 North Crescent Drive, Beverly Hills, California (Ans. Par. One). Litton Systems, Inc., is a wholly-owned subsidiary of Litton Industries. Its executive office and principal place of business is located at the same address as Litton Industries, Inc. (Ans. Par. One, Adm. 7/5/79, No. 328). Litton Microwave Cooking Products is a division of Litton Systems. (Respondent's Memorandum in Opposition to Complaint Counsel's Motion for Partial Summary Decision, April 6, 1979, pp. 4 and 8.)

2. Litton Industries, Inc., is a large, conglomerate corporation with numerous diversified products and a worldwide operation. (*Litton Industries, Inc.*, 85 F.T.C. 333, 337.) In 1969 it was ranked as the 39th largest industrial corporation in the United States, with nearly half of its growth attributable to over 100 acquisitions made since 1953, and had sales totalling $1.9 billion (85 F.T.C. at 337–38, 378).

3. Respondent Litton Systems through its Litton Microwave Cooking Products Division is now, and for some time in the past has

been, engaged in the manufacture, distribution, advertising, and sale of various products including microwave ovens (Ans. Par. Two).

4. Respondent Litton Systems, through LMCP, causes the said products, when sold, to be transported from their place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Said respondent maintains, and at all [5]times mentioned herein has maintained, a course of trade in said products in and affecting commerce. The volume of business in such commerce has been and is substantial (Ans. Par. Three).

5. In the course and conduct of said business, Respondent Litton Systems, through LMCP, has disseminated and caused the dissemination of advertisements for microwave ovens manufactured by Litton, by various means in or affecting commerce, including magazines and newspapers distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said microwave ovens (Ans. Par. Four).

6. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Litton Systems, through its Litton Microwave Cooking Products Division has been and is now in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of microwave ovens of the same general kind and nature as those sold by Litton (Ans. Par. Twelve).

II. THE ADVERTISEMENTS AND THE REPRESENTATIONS

A. *The Advertisements Were Widely Disseminated.*

7. The complaint in the present case was issued by the Commission with regard to a series of advertisements for Litton microwave ovens, based upon the results of two surveys of the opinions of purportedly independent consumer and commercial microwave oven service technicians. The national advertisements based upon these surveys appear in the record as CX 1, 2, 3, 4 and 6. These ads were disseminated in two separate campaigns, one occurring from October 1976 through February 1977 and the second from August through October of 1977 (CX 8; Interr. No. 61).

8. During the first campaign, ads for consumer microwave ovens (CX 1 and 2) were disseminated in the *Wall Street Journal, Better Homes and Gardens, Newsweek, Sunset,* and *Time* magazine, as well as in 27 different newspapers in cities across the country, including Atlanta, Boston, Chicago, Cleveland, Dallas, Detroit, Ft. Worth,

Houston, Ft. Lauderdale, Jacksonville, Miami, Orlando, Los Angeles, Minneapolis, New York, Newark (New Jersey), San Francisco, San Jose, Santa Ana, St. Paul, St. Petersburg, and Tampa (CX 8 and 9; Interr. No. 61; Ans. Par. Six). The consumer ad also was disseminated in two consumer trade magazines (CX 8 and 9). Ads for commercial microwave ovens (CX 4) were disseminated in eight trade publications directed toward the restaurant business, fast food [6]outlets, and institutions such as hospitals (CX 8; CX 12; Interr. No. 61; Ans. Par. Seven).

9. During the second ad campaign, in 1977, an ad for consumer microwave ovens (CX 3) was disseminated in *HFD Retailing Home Furnishings* (CX 8; Ans. Par. Six). Ads for commercial microwave ovens (CX 6) were published in five trade magazines, primarily directed toward the restaurant business (CX 8; CX 13; Ans. Par. Seven).

10. In addition to the national advertisements based on the service technician surveys, there were at least 109 local advertisements (106 print and 3 radio), based on the Litton surveys and placed by Litton microwave oven dealers (CX 14–25, 27–51, 54–71, 73–80, 82–84, and 86–128; summarized in CX 132). The advertising copy (referred to by Litton as advertising "slicks") upon which these local ads were based was disseminated by LMCP to its dealers and distributors in 1976 and 1977, with the suggestion that the dealers insert their own names and place the ads in the local media (Adm. 9/13/79, Nos. 261 and 262; Interr. No. 52; CX 289). At least 41 of these local ads were paid for in part or in total by Litton under its cooperative advertising program (CX 132; CX 148 O–R). These local advertisements were run between September 1976 and February 1978 in newspapers and advertising circulars, as well as on some radio stations, in cities and communities in at least 26 states across the country (CX 132). Many of the local advertisements which were published in late 1977 were still based on the original Litton advertisement copy (CX 48, 59, 101–104, 108, 112, 113) and some of these were paid for, in part, by LMCP (CX 132).

11. CX 239D is a table entitled "Survey Among Independent Service Agents" indicating that the Litton survey of service agencies revealed a preference for Litton in certain respects over named competitive brands. This table was provided to district and regional managers and distributors[1] at an annual sales meeting in Lake Geneva at some time prior to August 2, 1976 (CX 239A). This table was reproduced exactly in a local advertisement published in the

[1] LMCP distributed its ovens throughout most of the United States through 54 independent distributors who sold, in turn, to the individual retailers within their areas (Houserman, Tr. 2769–71).

Williamsport Sun Gazette on September 21, 1976 (CX 128; Niemasik, Tr. 1035–44). This [7]reveals that the information distributed at the Lake Geneva meeting was passed on to retailers through the Litton sales network.

12. A nine-page report of the results of the commercial technician survey, entitled "A Study of the Attitudes of Independent Commercial Microwave Oven Service Technicians Toward Brands of Commercial Microwave Ovens" was distributed by Litton at the National Restaurant Association Show in 1976 (CX 270; Tr. 1079).

13. Through the means described in Findings 10 through 12, above; the dissemination of advertising "slicks" to dealers and distributors, information supplied to district and regional managers and distributors at the Lake Geneva meeting, the dissemination of the report of the commercial oven survey at the National Restaurant Association Show, and Litton's participation in the cooperative advertising program; Litton provided the instrumentality to its distributors and dealers to make the representations referred to below.

14. CX 152, a four-page report of the consumer technician survey results, entitled "Consumer Service Agency Survey," is one version of a document intended to be used as a mailing piece to be sent to those persons requesting "complete survey results" as invited in the consumer survey advertisements (CX 308K–L; CX 1, 2 and 3). CX 178, a four-page report of the results of the commercial technician survey, entitled "Commercial Service Agency Survey," also was prepared as a mailing piece to be sent to persons requesting "complete results," as invited in the commercial survey advertisements (Adm. 7/5/79, No. 137; CX 308R; CX 4 and 6).

B. *The Consumer Oven Advertisements*

15. In CX 1 (Appendix A), the headline reads: "Quality is No. 1 at Litton!" The sub-head of this ad states: "76% of the independent microwave oven service technicians surveyed* recommend Litton." In the body of the ad, under a caption asserting that "Litton leads all brands," there is a chart containing percentage preference figures obtained from the survey of technicians servicing consumer microwave ovens. Litton is favored over all other brands on every point of comparison, and in most of the 20 comparisons the preference figure for Litton is greater than 50%. In the final column, showing the average preference for Litton over all competitors, the preference figure for Litton exceeds 50% in all categories. In the text of the ad, Litton highlights two of the statistics from the chart: "Among

independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those [8]surveyed said they would recommend Litton to a friend. And an average of 63% identified Litton brand ovens as having the best quality."

16. CX 2 (Appendix B), an ad which contains a picture of Dan R. Cavalier, President of the Marketing and Sales Division of LMCP, is substantially the same as CX 1. CX 3 is a revised version of CX 1 and 2 which adds the following clarification of the survey to the text of the ad: "Survey respondents were 234 technicians who work for independent service agencies authorized to service Litton microwave ovens, and who serviced at least one other microwave brand." But otherwise CX 3 (Appendix C) makes the same general representations as CX 1 and 2. The statistics in the last column of the chart in CX 3 (indicating the preference for Litton over all other brands) differ slightly from those in CX 1 and 2. However, the preference shown for Litton is still greater than 50% in each category of comparison.

17. CX 1, and 2 represent that the results of the survey are projectable to the population of independent microwave oven service technicians who service Litton and competitive brands of microwave ovens. Through the use of the term "surveyed" the ads represent that the opinions of technicians surveyed are representative of those of the general population of independent microwave oven service technicians who service Litton and competitive brands. Thus, representations 1-5, as alleged in Paragraph Six of the complaint, are plain from the face of CX 1 and 2. The ads convey that the majority of such independent microwave oven service technicians would recommend Litton, have Litton ovens in their homes, and are of the opinion that Litton ovens are superior in quality, easiest to repair, and have the fewest repairs when compared with other brands.

18. The claim that the survey results are projectable to a greater population of independent service technicians also is apparent in the numerous local advertisements based on the Litton surveys and placed by Litton microwave oven dealers (CX 14-25, 27-51, 54-71, 73-80, 82-84, and 86-128). In some cases, the representation of projectability is even more blatant in the local than in the national ads. For example, in CX 54 and 126, radio spot advertisements, paid for in part by Litton (CX 132), the copy reads: "73 percent of the *technicians who service microwave ovens* recommend Litton ovens over all other microwave ovens" (Emphasis added). Litton, in each of these two instances, paid a major portion of the cost of these promotions (CX 132B and D; Appendices J and K).

19. In many of the local advertisements derived from the Litton surveys, the term "independent microwave oven service technicians" is used without definition or explanation. Some [9]local ads merely used the headline, "76% of the independent microwave oven service technicians surveyed* recommend Litton," without any accompanying textual material or disclosure that only technicians who serviced Litton and one other brand were eligible respondents (CX 39, 41, 57). Some ads merely incorporated the chart showing the preference figures for Litton over other brands, with no accompanying explanation (CX 97 and 115). CX 40 shows the headline and the chart, but has no textual material. One series of local ads claims the following:

> A survey of 235 independent service agents has just been completed. The findings picked LITTON for best quality, fewer repairs, easiest to repair, lower cost for servicing. All this adds up to the best microwave on the market today (CX 67, 69, 76, 78, 88, 90, 95, and 96).

Litton participated in the cost for two of such advertisements, CX 95 and 96 (CX 132C). The copy for two radio advertisements simply refers to "technicians who service microwave ovens":

> Are you still skeptical about buying a microwave oven? Or maybe you're just unconvinced about which brand to buy? Well, when it comes to microwave ovens, one name is leading all the rest. That's right! It's Litton! 73 percent of the technicians who service microwave ovens recommend Litton ovens over all other microwave ovens (CX 54 and 126).

And another radio ad talks about "a recent survey of independent microwave service technicians," with no explanation or definition of terms (CX 127). These local advertisements represent that all independent service technicians were surveyed, not merely those technicians working for agencies which service Litton and at least one other competing brand.

20. The final representation alleged in Paragraph Six of the complaint is that such representations of preferences by independent microwave service technicians were proved by a survey conducted by Custom Research, Inc. Again the advertisements speak for themselves. CX 1, 2 and 3 rely upon the Litton survey of consumer microwave service agencies to support the claim that certain percentages of service technicians prefer Litton ovens in the stated respects. Thus, Litton uses the survey as proof of such claims. [10]

21. Therefore, in CX 1 (Appendix A), the initial consumer microwave independent technician survey advertisement, printed in the *Wall Street Journal,* October 25 and December 13, 1976, and elsewhere, and in other advertisements substantially similar thereto

(Ans. Par. Six) Litton has represented, directly or by implication, that:

1. The majority of independent microwave oven service technicians servicing Litton and competitive microwave ovens would recommend Litton to a friend.
2. The majority of such independent microwave oven service technicians are of the opinion that Litton microwave ovens are the easiest to repair of all microwave oven brands.
3. The majority of such independent microwave oven service technicians are of the opinion that Litton microwave ovens are superior in quality to all other microwave oven brands.
4. The majority of such independent microwave oven service technicians are of the opinion that Litton microwave ovens require the fewest repairs of all microwave oven brands.
5. The majority of such independent microwave oven service technicians have Litton microwave ovens in their homes.
6. Representations 1-5 were proved by a survey conducted by Custom Research, Inc., in June 1976.

22. The revised consumer microwave independent technician survey advertisement (CX 3—Appendix C) printed in *HFD Retailing Home Furnishings,* August 22, 1979, and elsewhere (Ans. Par. Six), made the same representations, except the universe of technicians to which such preference claims were applied was more limited. The revised ad included only service technicians who worked for independent service agencies authorized to service Litton microwave ovens, and who serviced at least one other microwave oven brand. The revised advertisement still referred to a survey, however, so it represented that the 234 technicians "surveyed" were representative of a broader group of technicians who fit this definition—technicians working for Litton authorized independent agencies who serviced at least one other brand.

23. In CX 1, 2 and 3, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that: [11]

1. Litton microwave ovens are superior in quality to all other microwave oven brands.
2. Litton microwave ovens are the easiest to repair of all microwave oven brands.
3. Litton microwave ovens require the fewest repairs of all microwave oven brands.

24. The explicit representations of CX 1 (Exhibit A of the complaint), CX 2 and CX 3 (Exhibit B of the complaint) are that independent microwave oven service technicians believe these three assertions to be true. The person reading the ad receives the impression that because service technicians prefer Litton ovens, in the manner indicated, Litton ovens must in fact be superior to other brands. The superior quality, ease of repair, and infrequency of repair of Litton microwave ovens are the implicit representations of these ads (CX 1, 2 and 3).

25. In one of the local radio advertisements based upon the Litton service technician survey (but for which there is no record evidence that Litton contributed to its cost, CX 132D), the implicit claims of CX 1, 2 and 3 were made explicit, with the direct assertion that the technician is an expert who knows much more about microwave ovens than the consumer and whose advice therefore should be heeded:

If you're shopping for a microwave oven, you're going to be asking a lot of questions. Because there are a lot of different brands and features to consider. To help you make your decision wisely, here are some *facts* to consider. In a recent survey of independent microwave service technicians, 76 per cent said *Litton* would be *the* microwave brand they'd recommend to a friend. That's 3 out of 4 who'd recommend *Litton.* And when asked which microwave oven requires the *fewest* repairs—and is *easiest* to repair, the great majority said *Litton.* And quality? Again most technicians said *Litton.* And naturally, far more technicians said that *Litton* was the brand that they had in their own homes. Chances are, you don't know as much about microwave ovens as a service technician. He's an expert, and therefore his opinion and recommendations are worth listening to. And 3 out of 4 recommend *Litton!* (CX 127). [12]

This advertisement simply states the message which Litton intended the reader to glean from CX 1, 2 and 3—independent service technicians know best, and they prefer Litton.

C. *The Commercial Oven Advertisements*

26. In CX 4 (Appendix D—Exhibit C attached to the complaint), the headline reads: "Litton is the best commercial microwave oven buy." The sub-head reads: "80% of the independent microwave oven service technicians surveyed recommend Litton to their customers." The textual material below the sub-head relates:

When technicians servicing Litton and competitive brands were asked in an independent survey which microwave oven they'd recommend to prospective customers, 80% said 'Litton'. An overwhelming preference over major competitive brands like Amana and Sharp.

These experienced servicemen prefer Litton over other brands for many reasons.

To the right of the text is a chart containing the percentage figures derived from the commercial technician survey. In all cases the preference for Litton exceeds 50%. The concluding paragraph of the text states: "Take the advice of your independent microwave serviceman, Litton is the best commercial microwave oven you can buy."

27. As with CX 1, 2 and 3, the representations alleged in the complaint are clear from the face of CX 4: that the majority of certain independent microwave oven service technicians would recommend Litton ovens and hold the opinion that Litton commercial microwave ovens are superior in quality, easiest to repair on location, require the fewest repairs, and are the least costly to maintain in operation over time when compared with other commercial microwave brands. Litton represents that the Custom Research commercial technician survey is evidence of the technicians' preference. Through use of the term "surveyed" the ad represents that the technicians surveyed are representative of the population of independent commercial microwave oven service technicians who service Litton and competitive brands (CX 4).

28. CX 6 (Appendix E—Exhibit D of the complaint) is a slightly altered version of CX 4. Its headline states: "79% of [13]microwave service technicians surveyed say Litton is the best quality commercial microwave oven." And the sub-head reads: "80% would recommend Litton to their customers." In the text of CX 6, it is disclosed that the "[s]urvey respondents were 211 technicians who work for independent service agencies authorized to service Litton commercial microwave ovens, and who service at least one other brand." But otherwise, CX 6 makes the same general representations as CX 4.

29. Therefore, in CX 4, the initial commercial microwave independent technician survey advertisement, printed in *Hospitality (Restaurant),* November 1976, and elsewhere, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. The majority of independent microwave oven service technicians servicing Litton and competitive microwave ovens would recommend Litton to their customers.

2. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are superior in quality to all other microwave oven brands.

3. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave

ovens are the easiest to repair on location of all microwave oven brands.

4. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.

5. The majority of such independent microwave oven service technicians are of the opinion that Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

In addition, in CX 4, Litton has represented, directly or by implication, that Litton is the best commercial microwave oven buy and that this representation was proved by the above-referenced survey.

30. The revised commercial microwave independent technician survey advertisement (CX 6) printed in *Restaurant Business,* September 1977, and elsewhere (Ans. Para. Seven) made the same representations, except the universe of technicians to whom such [14]preference claims were applied was more limited. It included only service technicians who worked for independent service agencies authorized to service Litton and who serviced at least one other brand. Since the advertisement still referred to a survey, it represented that the 211 technicians surveyed were representative of a broader group of technicians who fit this description—technicians working for Litton authorized agencies who serviced at least one other brand.[2]

31. In CX 4 and CX 6, and in other advertisements substantially similar thereto, Litton has represented, directly or by implication, that:

1. Litton commercial microwave ovens are superior in quality to all other microwave oven brands.

2. Litton commercial microwave ovens are the easiest to repair on location of all microwave oven brands.

3. Litton commercial microwave ovens require the fewest repairs of all microwave oven brands.

4. Litton commercial microwave ovens are the least costly to maintain in operation over time of all microwave oven brands.

32. The explicit representations, that independent microwave service technicians believe these propositions to be true, are also

[2] The revised commercial ad differed in at least one other respect from CX 4 in that it eliminated the explicit statement that "Litton is the best commercial microwave oven buy." This is, of course, still the general message conveyed by the language of this advertisement (CX 6).

implicit representations that the assertions are in fact true. Consumers of commercial microwave ovens will derive from the ads an overall impression of superiority of the Litton brand (CX 4 and 6).

D. *The Local Advertisements*

33. All or some of the claims alleged in Paragraphs Six and Eight of the complaint are contained in each of the local advertisements based on the Litton surveys (CX 14–25, 27–51, 54–71, 73–80, 82–84, and 86–128). Some local ads incorporated [15]the representations of the national ads in their entirety (e.g., CX 14). Others incorporated only selected claims (e.g., CX 39 and 67). Litton paid all or a portion of the cost for a number of the latter ads, even though they did not contain the full text of its national advertisements (e.g., CX 39, 54, 60–66, 95–96, 106, 115, 120–122, and 126).

E. *Representation of Reasonable Basis*

34. In each of the advertisements discussed above LMCP made the representation, directly or by implication, that it had a reasonable basis of support for the claims made in those advertisements, as of the time those representations were made. The over-all tenor of each of these advertisements is that the Litton surveys provided a reasonable basis for such claims (e.g., CX 1–4, and 6).

F. *Representation That Surveys Were Independently Conducted*

35. The complaint charges and complaint counsel urge that respondents have also represented in the above mentioned advertisements that the survey which supported their preference claims were "independently" conducted by Custom Research, Inc. (Complaint, Pars. Six and Seven). Complaint counsel argue that since LMCP's marketing staff was largely responsible for the planning and design of the surveys (Finding 41, below), that such a representation is false.

36. In one of its advertisements, CX 4—the original commercial ad, Litton claimed that the statistics stated therein were based on an "Independent survey by Custom Research, Inc." In all other ads it was simply noted that the survey was conducted for Litton by Custom Research, Inc. In either case I find that the reader was not likely to believe that the Litton surveys were totally independent. It is difficult to perceive how any reader of the advertisements in question could possibly believe that the surveys were conceived, designed and conducted without any input by Litton, in view of their narrow focus. Further, the contact part of the surveys—which might

be thought of as the "conduct" of the surveys—was, in fact, conducted independently by Custom Research, Inc. (CX 145B, 248A–B).

37. Complaint counsel's own experts cast some doubt upon their position. In defining an "independent" survey they were not able to pin it down to a single definition, but [16]instead, referred to a continuum from totally independent to totally dependent. While their testimony would place the Litton surveys at the lower end of this continuum, they would concede some degree of independence was present in the Litton surveys (Miller, Tr. 586–90; Sudman, Tr. 1717–20).

III. LACK OF REASONABLE BASIS

A. *The Litton Surveys*

38. The advertisements in question were based on two surveys conducted in 1976 for LMCP by Custom Research, Inc. (CRI), a market research firm located in Minneapolis, Minnesota. The latter firm screened the survey respondents and conducted the telephone interviews (CX 145B). The data from the surveys was keypunched, verified and tabulated by another company, Maple Plain Company, Maple Plain, Minnesota (CX 145B).

39. The first of these surveys was taken of commercial microwave service agencies.[3] It was conducted in two parts, with the first and basic portion of the survey being taken during the period April 28, 1976 to May 4, 1976. A follow-up survey was then made of these same commercial service agencies during the period September 1, 1976 to September 8, 1976, at which time the agencies were asked which brands of microwave ovens they serviced (CX 179B, 308–O–P). The latter information was required because during the interim period LMCP had decided to advertise the results of the survey (George, Tr. 2023; Houserman, Tr. 2786, 3401–02; CX 308A, O–P).

40. The second survey was taken of consumer microwave oven service agencies.[4] It was conducted during the period June 22, 1976 to June 25, 1976. It was modeled after the commercial survey, with the exception that it included questions designed to elicit the identity of brands serviced along with the preferential questions asked in the commercial survey (CX 150, 184, 308A and J, 145B, 152A and 305B).

41. The survey questionnaires were, in each case, primarily the work-product of LMCP's marketing staff (CX 145B, 248, 305A, [17]

[3] Commercial microwave ovens are those used commercially by such enterprises as vending machine companies and restaurants.

[4] Consumer microwave ovens are those primarily sold for use in the home.

and 308E–J). Such surveys were not conducted with advertising in mind. At their inception they were devised for internal use only. After seeing the results, LMCP's marketing personnel decided to use them in advertisements (George, Tr. 2025–26, 2032–33, 2034–35; Houserman, Tr. 2784–85; CX 177).

42. Such surveys were designed to elicit opinions as to certain quality preferences from independent microwave oven service agencies (CX 152, 177, 178, 162 and 163). Respondent's definition of an "independent microwave oven service agency," as used in the surveys, is one which services one or more brands of microwave ovens and other appliances, but does not sell microwave ovens or other appliances, and is not owned or controlled by a manufacturer (Houserman, Tr. 2787, 2790–91, 2930–34; CX 1–4, 6). This definition is in accord with the industry definition of the term (Jadwin, Tr. 885–94; Seitz, Tr. 2335–37; Omstead, 2519–20; Winters, Tr. 2660). It is also a logical one. The service technicians who testified in this proceeding indicated uniformly that they depended primarily on referrals from retailers for their business and that they would be unable to get such referrals if they were competing with those retailers for sales (Seitz, Tr. 2337; Omstead, Tr. 2520; Winters, Tr. 2686, 2660, 2748).

43. LMCP's marketing staff, in preparation for the surveys, obtained copies of the Litton authorized service agency lists (for both commercial and consumer ovens) from Mr. Houserman, the company's national field service manager (Houserman, Tr. 2785; CX 162 and 163). In addition, LMCP had in its possession the service agency lists of two of their competitors, Sharp and Magic Chef. Such lists were placed inside ovens sold by those manufacturers and had been obtained by LMCP prior to the conduct of the surveys (CX 175, 176; RRB, p. 110). The Sharp list (CX 175) was originally prepared in 1975 and was still being packed in Sharp ovens in 1976 (Jadwin, Tr. 885–87, 888–94). The Magic Chef list (CX 176) was published in approximately August of 1973 and had been superseded by other lists prior to 1976 (Wooden, Tr. 998–1000, 1003–07).

44. LMCP was aware that its own service agency lists (CX 162 and 163) did not contain the names of all agencies which serviced its microwave ovens. Such lists only contained the names of agencies which were authorized to do in-warranty work on Litton ovens. Due to the essential similarity of microwave ovens, agencies which serviced other brands of ovens could and would be repairing Litton ovens as well (Seitz, Tr. 2347–55). The LMCP marketing staff thus turned again to Mr. Houserman for an estimate of the number of such service agencies that might exist. Mr. Houserman estimated that there would be approximately 100 of such agencies (Houserman,

Tr. 2790, 3028; [18]Response of 7/5/79 to Requests for Admissions, p. 22, Admission No. 25; RRB, pp. 12 and 64). To be on the safe side the marketing staff considered that there might be as many as 200 (CX 177; CX 152A and 178A).

45. The Litton surveys were designed and conducted as a census of the agencies on the two Litton lists, *i.e.,* the commercial and consumer lists.[5] An attempt was made to contact each and every one of those agencies (CX 209; Zeisel, Tr. 4148–49). No attempt was made to contact any of the additional 100 agencies that were estimated to be then servicing Litton ovens but who were not on the lists of authorized agencies (CX 148B–C).

46. In the conduct of this "census" it was decided to weigh only the opinions of personnel at agencies which serviced two or more brands of microwave ovens, with one of those brands being Litton (CX 148B). It was also decided that the interviewer must speak to a qualified technician at each agency. To be qualified the technician must have serviced Litton and one or more other brands of microwave ovens and have been engaged in such business for at least one year at the time of the survey (CX 150, 184, and 185).

47. The technicians interviewed at the agencies to be covered in the "census" were intended to be representative of all independent microwave service technicians in the United States who serviced two or more brands of microwave ovens (one of which was Litton) (CX 152A, 178A, 1–4, 6, 308Z006–Z007).

48. CRI attempted to contact each agency on each list, in the two surveys. In connection with the commercial survey, 211 interviews were completed; that is, a qualified technician was contacted who answered the questions presented by the interviewer. In addition, 6% of the agencies on the list were no longer servicing commercial ovens, were no longer in business, or the number was disconnected, 19% did not qualify [19](serviced only one brand), and 5% would qualify but would not participate. At 38% of the agencies a qualified technician could not be reached after repeated calls (CX 178A).[6] In the consumer survey, 234 interviews were completed (a qualified technician was reached who would answer the questions). In this case, 16% of the agencies on the list did not qualify for interviewing

[5] A census is a survey in which an attempt is made to contact all members of a universe and measure them concerning the required characteristics or opinions (Miller, Tr. 487–88; Roshwalb, Tr. 3187–89; Zeisel, Tr. 4148–49). A universe (or population) is a collection of all units that are to be eligible for inclusion in a survey and to which the results of the study are intended to be generalized (Sudman, Tr. 1663; Miller, Tr. 474–75; Roshwalb, Tr. 3630–31).

[6] Complaint counsel attempted to prove that there were an insufficient number of call-backs (repeat calls) to agencies which could not be reached, or at which a qualified technician could not be reached. Their arguments were primarily based on CX 153. However, complaint counsel were unable to show that this document was probative on this point (Tr. 3592, 4381 and 4383). Thus, the only evidence of record indicates that "repeated calls" and "up to six calls" were made to such agencies (CX 152A, 178A and 308B).

(serviced only one brand, had less than one year's experience, or only serviced commercial ovens), and 3% qualified but would not participate. At 34% of the agencies a qualified technician could not be reached after repeated calls (CX 152A).

49. The data was then keypunched, verified and tabulated by Maple Plain Company (CX 145B) to obtain the statistics later cited in respondents' advertisements.

50. In addition to its knowledge that each of these surveys omitted approximately 100 service agencies which serviced Litton ovens and at least one other brand, Litton knew or should have known that the lists of service agencies utilized included a number of servicing-dealers. Mr. Houserman, who supplied the lists to the LMCP marketing department, was well aware that at least two exceptions were made to the rule that the said lists of authorized service agencies (CX 162 and 163) listed service-only agencies. The exceptions were: that servicing-dealers were sometimes listed in "boondock" areas where an independent servicer could not be found to service Litton ovens; and secondly, some servicing-dealers insisted on being included on the list as a pre-condition of their purchase of Litton ovens for resale (Houserman, Tr. 2863–64, 2872–73, 3103, 3125–26). Moreover, Litton was placed on further notice of this fact by "verbatim" comments which were placed on a number of the completed questionnaires, indicating that the agencies in such instances also sold microwave ovens at retail (For example, see CX 150–Z016–Z019, 150–Z136–Z139, 150–Z553, 150–Z572–Z575, 150–Z688–Z691, and 185–Z003–Z005). [20]

51. Litton was also aware that the questionnaire used in the survey was designed only to obtain the opinions of a qualified technician at each agency. No attempt was made to randomize the selection of such technicians, or to determine whether the opinion of the contacted technician was representative of all the technicians employed by his or her agency (CX 150, 184 and 185; Zeisel, Tr. 4145).

B. *Substantial Defects In The Litton Surveys*

52. Contrary to the definition of the universe in the Litton surveys, the Litton lists used for such surveys included servicing-dealers as well as independent service agencies (Finding 50, *supra*). The number of servicing-dealers included in those lists may well have been substantial. As previously noted there were two major exceptions to the exclusivity of CX 162 and 163 (the Litton lists): (1) Servicing-dealers are put on the list in "boondock" areas where no one else can be found to service Litton ovens; and (2) Servicing-

dealers who insist on being placed on the lists as a pre-condition to purchasing Litton ovens for resale were sometimes included (Houserman, Tr. 2863–64, 2872–73, 3103, 3125–26). Complaint counsel subpoenaed LMCP's records to determine if there were any direct sales by Litton to agencies on CX 162 and 163 during fiscal year 1976. Those records revealed such sales to 20 agencies on the consumer list (CX 162) and 15 on the commercial list (CX 163; Tr. 3069–74). Moreover, on cross-examination Mr. Houserman admitted that four other agencies on the two lists were known to have purchased ovens from Litton for resale (Tr. 3104–07, 3127). This raised the number of admitted servicing-dealers to 24 on the consumer list and 19 on the commercial list. Further, respondents' earlier answers to interrogatories had established that four more agencies on the consumer list and five more on the commercial list were servicing-dealers in 1976; thus raising the totals to 28 and 24, respectively.[7] [21]

53. The testimony of Mr. Houserman, however, indicates that these numbers may be only the tip of an iceberg. He admitted that Litton's records would only cover sales to agencies in markets where Litton sold directly to the retailer (Tr. 3111–12). Thus, in the greater part of the country, where LMCP sells through distributors, only the distributors records would show whether agencies on the lists for those markets purchased ovens for resale in 1976.[8] Mr. Houserman also generally exhibited a lack of knowledge as to the scope of the business activities of agencies on the lists who were not in direct buying market areas (Tr. 3043–44, 3045–50). Nor did he check to determine the number of servicing-dealers on the lists prior to their use as a basis for the market surveys in question (Tr. 3067).

54. The only logical inference that can be drawn from these facts is that Mr. Houserman's two exclusions to the general rule (Finding 50 and 52, *supra*) applied to the 54 distributor markets as well as the direct selling markets. In fact, some of the answers to the survey questionnaires themselves indicate that this is so. Although the survey questionnaires did not elicit such information, some of the

[7] Complaint counsel also introduced evidence showing sales of Magic Chef appliances to certain of the agencies on Litton's lists (Wooden, Tr. 4552–82). Although portions of this evidence are of doubtful substantiality, showing few if any sales of appliances, some of the sales revealed therein indicate the agencies making such purchases must have been dealers (Wooden, Tr. 4552–53, 4574, 4575, 4576, 4577, 4578, 4579, 4580, 4581) and the overall impact of such evidence reinforces other evidence of record indicating that many of the listed agencies were, in fact, servicing-dealers.

[8] Litton's distribution system for consumer ovens consisted of three categories in 1976. Throughout most of the nation it sold through 54 product distributors, who dealt with the individual retailers and also set up the service network in such areas. It also had certain direct market areas where it acted as the distributor itself and sold directly to the dealer organizations. These were several large metropolitan areas (New York City, Detroit, Cleveland, Chicago, Dallas/Fort Worth, San Francisco Bay area and Los Angeles), the State of Florida and the State of Minnesota. Additionally, it also made direct sales to a category of purchasers called National Accounts. The latter consisted of direct sales to premium houses, such as, American Express credit card distribution, Gulf Oil credit card department, etc. (Houserman, Tr. 2769–71).

interviewees volunteered information showing they were dealers. (See for example, CX 150-Z016-019, 150-Z136-Z139, 150-Z553, 150-Z572-Z575, 150-Z688-Z691, and 185-Z003-Z005). [22]

55. Under the circumstances, the weight of the evidence herein indicates that the admitted servicing-dealers included on the Litton lists, which were from the direct buying areas only, must be illustrative of similar experiences throughout all the marketing areas serviced through Litton's 54 distributors.[9]

56. Thus, the evidence shows that the number of servicing-dealers included on CX 162 and 163 may be quite substantial. The necessary corollary is that a substantial number of the respondents to Litton's surveys may also be servicing-dealers.

57. Respondents' own experts have shown that the answers of a servicing-dealer would tend to be biased in favor of a brand which it sells, and that such agencies should not be included in the survey for that reason (Zeisel, Tr. 4110; Roshwalb, Tr. 3587-88; RX 72W-Z18). In fact, Mr. Roshwalb conceded that he would be concerned if 10 to 15% or more of the Litton survey respondents were actually servicing-dealers (Roshwalb, Tr. 3587-88; *See also,* Miller, Tr. 561-62, 700-01).

58. Under these circumstances the two Litton surveys upon which the advertising herein were based must be considered fatally defective. Once Litton was on notice that their lists of service agencies were not pure; that is, that they contained servicing-dealers as well as service-only agencies, steps should have been taken to determine the extent of that problem. Having failed to do so, the surveys could not be considered a reasonable basis for the claims made in the advertisements.

59. The Litton surveys were also defective in that they did not elicit the opinions of the "100" other agencies which serviced Litton microwave ovens, but were not on the two Litton service agency lists.[10] The universe for the surveys was [23]defined by Litton itself as all independent service agencies servicing two or more brands of microwave ovens (one of them being Litton) (CX 1-4, 6, 152, 178). Moreover, as noted above, respondents intended to make a "census", which necessitated an attempt to contact each and every member of

[9] Respondents have urged in their Reply Brief that there could be no servicing-dealers in the distributor areas and cite to several areas of the record for support (RRB, pp. 44-45; Proposed Finding 59). I have reviewed the citations given and they do not support respondents' position. Moreover, the record evidence, as cited above, convincingly destroys such position. The fact is that the record shows that some agencies in the distributor areas were servicing-dealers and that there were undoubtedly more that were not identified by name on the record.

[10] It should be noted that respondents claim that a portion of CX 72 which was not received in evidence would have proven the number of such unidentified other agencies to have been slightly less than 100; about 77. However, for reasons set out below, where I discuss respondents' exceptions to several of my rulings, the rejected portion of that exhibit could not have reliably determined the number of such other agencies. The only substantial evidence on this point is the evidence above in Finding 44.

the chosen universe. Yet Litton chose to completely ignore one-sixth of its defined universe from the very inception of these surveys (CX 148B–D).

60. Further, in view of the fact that Litton's service lists contained a substantial number of agencies which were not properly members of the universe, such as, servicing-dealers, agencies which did not service Litton and one other brand and agencies which were no longer in business, the problem is exacerbated (CX 152, 178). In other words, these "100" agencies probably amounted to more than one-sixth of the intended universe.

61. Respondents' primary defense against this obvious defect is that they were unable to identify any of these unlisted agencies and were thus forced to rely solely on their own lists (CX 148B–C). This is not entirely true.

62. Respondents had in their possession, prior to the surveys, service agency lists of two of their competitors. It is claimed that they could not use such lists, however, because they were both several years old (CX 148C).[11] While this was [24]true of the Magic Chef list, the Sharp list had only been published in 1975 and was still being packed in ovens sold in 1976 (See Finding 43, *supra*). Moreover, even the 1973 list probably listed a substantial number of service agencies which were still in business, since it was only three years old (even if they may have no longer been authorized Magic Chef repair agencies). Litton cannot now prove that these lists might not have provided an adequate basis for "sampling"[12] the additional "100" agencies, since Litton did not even try to make such a test (CX 148B–D). In the absence of such proof I must assume that it was possible to get some indication of the preferences of the additional "100" agencies by questioning agencies listed on these two lists who were not on the Litton lists.

63. This defect is even more serious when it is realized that the additional "100" servicers who serviced Litton and at least one other brand were not authorized Litton servicers. Although I don't agree with complaint counsel that authorization is a substantial biasing factor in and of itself (see discussion below), it is clear to me that familiarity with a particular brand would influence an agency's

[11] In their proposed findings and briefs respondents cite to other alleged defects with these lists, based primarily on other lists of service agencies supposedly serving these two companies which complaint counsel introduced as a basis for their Chilton Survey, discussed below. Since I find the Chilton Survey and its underlying lists defective, as is discussed below, such arguments are not persuasive. Moreover, there is no evidence that Litton was aware of any defects in such lists, with the possible exception of age, at the time they were determining what universe to survey (CX 148B–C).

[12] Sampling can be defined as taking a sample from a universe for the purpose of drawing inferences about that universe. A sample is a subset of the universe drawn from the universe in such a manner that it in some way represents the population (universe) from which it was taken (Miller, Tr. 476, 478–79).

opinion as to the relative quality of various brands. Some of the verbatim comments recorded on certain of the questionnaires from the Litton surveys indicate that where an interviewee's experience with a particular brand is limited, the technician is not likely to select that brand in a preference poll (CX 150-Z196-Z199, 150-Z416-Z419, 150-Z420-Z423, 150-Z544-547, 150-Z640-643, 150-Z752-Z755, 150-Z792-Z795, 150-Z796-Z799, 150-Z820-Z823, 150-Z844-Z847, 150-Z884-887, 185M-O, 185-Z085-Z087, 185-Z223-Z225, 185-Z226-Z228; *see also,* CX 239B). The record reveals that the unauthorized servicers of Litton ovens were not likely to service a great number of Litton ovens (Houserman, Tr. 2844-50). Accordingly, it can be expected that their answers to the preference questions in these surveys might have differed substantially from those on the Litton authorized lists (CX 239B).

64. In the light of these facts, respondents did not have a reasonable basis for advertising that their surveys revealed [25] certain preferences for Litton among independent service agencies which serviced Litton and one or more other brands of microwave ovens, since a substantial portion of such universe was not included in the surveys.

65. This is especially so where, as here, the attempt was to conduct a census, rather than a mere sampling. Respondents' arguments concerning the United States Census and its imperfections (RRB, pp. 99-100) do not detract from this point. It is clear that in the United States Census an attempt is made to contact every person in the universe. Moreover, the United States Census is not used as the basis for advertised claims and users of its results are well aware of its shortcomings.

66. To the extent the Litton surveys were used as the basis for claims of preferences among a universe of microwave oven service "technicians", they were also defective. This is so because the surveys were only made of agencies, not technicians[13] (Miller, Tr. 526-27). As noted previously, CRI made an attempt to contact one technician at each agency on the Litton lists. It was their practice to speak to either an experienced technician or the manager at each agency contacted (CX 150A, 185A). There was no attempt to obtain the opinion of more than one technician at any one agency (CX 150, 185). Further, there was no effort made to determine if the technicians being interviewed were even representative of the technicians within each agency, let alone whether their views were

[13] The evidence reveals that some of the agencies on the Litton lists employed as many as ten or eleven technicians (Houserman, Tr. 2924; Seitz, Tr. 2411).

representative of all independent technicians who serviced Litton and one or more other brands (CX 150, 180).

67. A survey conducted by respondents' experts for the purposes of this litigation (RX 72-Z19-Z27) reveals the seriousness of this defect with relationship to advertised claims that the Litton survey was made of technicians. This survey was made to determine the effect of random selection of technicians within each agency.[14] In the course of this **[26]**latter survey the technician randomly selected was frequently the first and only technician spoken to. However, in 42 instances the survey required eliciting a preference as to best quality from two technicians (See RX 72-Z24-Z27; CX 361). In 22 out of those 42 instances the second technician's preference differed from the first technician's (CX 361). This is substantial evidence that the opinion of a single technician at an agency employing a number of such technicians is not representative of all technicians within that agency and that the procedure followed by Litton in its surveys could not be expected to indicate the preferences of the universe selected therein—independent microwave oven service technicians who serviced two or more brands (one of them Litton).

68. Therefore, Litton did not have a reasonable basis for advertising that its surveys revealed certain preferences among such independent service technicians.

69. The evidence of record also indicates that the surveys failed to establish that the respondents thereto possessed sufficient expertise with the various brands they claimed to service to qualify as respondents for a microwave oven comparative brand survey. The primary evidence of this defect is supplied by verbatim responses of the interviewees entered on the questionnaires. Such information was certainly known by Litton prior to the publication of the advertisements and militate against respondents arguments that they had a reasonable basis for the claims made in such advertisements.

70. For example, the verbatim comment on CX 150-Z199 indicates this interviewee had insufficient experience with Amana to make a preferential comparison between an Amana oven and a Litton oven. This respondent stated, "I really don't know that much about servicing of Amana . . . ." This interviewee listed Amana, Litton and others as the brands serviced, so he would have been included in the preferential chart rating Litton as compared to

[14] This study was made in response to the position of complaint counsel and their experts that the Litton surveys could not even be considered to be a survey of the service agencies, since a random selection basis was not used to select the technician interviewed at each agency. Thus, it was argued that the technician interviewed might not be representative of the entire agency. Statistically speaking, the random selection procedure was posited as giving a better chance that the technician selected for the interview would be representative.

Amana (CX 150-Z197). Under most of the preference questions he listed Litton as the preferred brand (although he did have an Amana in his home). This interviewee's answers are of doubtful validity because he did not have enough [27]experience servicing Amana (Miller, Tr. 532-33; Sudman, Tr. 1697-98).[15]

71. On CX 150-Z417, the interviewee again indicated that experience played a great part in his statement of preferences. This respondent had listed Amana, Magic Chef, Panasonic, Sears (Kenmore), Sharp and Wards (Signature), as well as Litton as the brands serviced, so his responses would have been computed as showing preferences between these brands (CX 150-Z417). Yet in connection with the very first preference question, in which he indicated a preference for Amana, he stated, "I'm more familiar with it [Amana]." He went on to select Amana as the brand preferred in each of the preference questions (CX 150-Z417-Z419—he did indicate he had a Magic Chef, as well as an Amana in his home). Again, the comparative experience in servicing the various brands was pointed out as a critical factor in the preferences of the interviewer. Again, a "red flag" was raised for Litton to see that some inquiry should have been made into the experience of the interviewed technician with the various brands being compared. Since familiarity was an important factor with this respondent, it should have been determined whether his experience with the other brands was sufficient to make his ratings meaningful (Miller, Tr. 533-34).

72. CX 150-Z421 also illustrates this problem, when in rating Litton and GE as the "easiest to repair," this respondent volunteered that it "depends on how many of a brand you work on." CX 150-Z544-547, similarly shows the importance of comparative experience. In connection with the various questions asked of this respondent he made such remarks as, "because we served more Litton than any other," "because I can service it" (after answering that he would recommend Litton to a friend), and "Don't have enough experience on other brands besides Litton" (CX 150-Z545-Z547). Other comments indicating experience was a factor which should have been probed further in the Litton surveys are found at CX 150-Z603, Z640, Z755, Z794, [28]Z797, Z845, Z887; CX 185B, E, O, R, V, Z86, Z224, and Z227. Since these were all volunteered remarks, there being no questions in the survey designed to qualify a respondent by experience, I am led to the same conclusion as that

[15] Respondents' argument that this verbatim comment was in response to a question not used in the Litton advertisements (RRB, p. 153) is really beside the point. The fact is this interviewee indicated a lack of experience in repairing Amana ovens. This certainly casts some doubt on his rating of Litton as "easiest to repair," requiring "the fewest repairs," and "best quality", for example. Such an answer should have raised a "red flag" in Litton's mind as to the need for further qualification of the interviewees in the survey questionnaire.

reached by complaint counsel's experts. That is, that the interviewees were not properly qualified as to experience and the survey is, consequently, unreliable (Miller, Tr. 548, 532–47; Sudman, Tr. 1697–1701, 1703–04).[16]

73. LMCP was also aware that its surveys were not originally designed for the purpose of advertising. Surveys which are to be the subject of advertisements should be conducted under stricter standards than those which are for internal company use only (Zeisel, Tr. 4257–62). Litton, therefore, should have carefully re-evaluated the surveys and the methodology followed therein, prior to using the results in advertisements. It is clear, in light of the previous findings, that such a critical re-evaluation was not made in this case (See Miller, Tr. 591–92).

74. Moreover, the complaint herein charges and I have so found above (Findings 21, and 29) that the Litton advertisements represented that certain preference claims were proven by the two Litton surveys. [See Complaint, Pars. Six (6) and Seven (7)]. In view of the above findings that Litton lacked a reasonable basis for making such preference claims, it must also be found then that the representation that such claims were proven by the surveys is false and misleading.

C. *Rejection of Certain of Complaint Counsel's Criticisms of Surveys*

75. In addition to the above defects, which I find to be substantial, complaint counsel urge that there are other defects in Litton's surveys. In the main, I find that these other alleged defects are inconsequential, have not been proven to be consequential, are subsumed in the principal defects noted above, or are simply not defects at all. In view of my basic findings, there is no need to discuss each and every one of these alleged defects. However, I will dispose of a few of the principal ones cited by complaint counsel. [29]

76. Among such alleged defects, complaint counsel take issue with respondents' definition of the universe for this study. They urge that the proper universe includes all independent service agencies, whether they service Litton ovens or not,[17] and including servicing-dealers. Much of their evidence and the testimony of their experts is based on this theory—that servicing-dealers are part of the universe. Such position flies in the face of the evidence of record which shows

[16] This problem is, of course, compounded by the fact that the interviewees in the Litton surveys were all from agencies on Litton's lists of authorized service agencies.

[17] As noted in Finding 19, *supra*, some of the advertisements can be read as implying that the survey results were representative of all independent service technicians. However, for the purpose of these findings, I am conservatively using the universe which Litton apparently intended using in its surveys—independent service technicians who serviced two or more brands (one of them being Litton).

that Litton adopted a narrower universe in its studies and that such narrower universe conformed to industry definitions and logic (See Finding 42, *supra*). Complaint counsel's position is based on two factors: (1) Their reading of the advertisements as implying such to be the fact through use of terminology such as "independent microwave oven service technicians surveyed," and (2) Because the lists which Litton used in its surveys included servicing-dealers. As for the first, it is not so obvious that the public perception of the term "independent service technicians" would include servicing-dealers. The expert testimony of record in this case would indicate that it would not. Dr. Ward testified that the public perception of "independent" would be that such technicians were free from any "biasing influence" (Tr. 3979). It is probable that association with a retail store would be considered a "biasing influence". Technicians so employed would be expected to be loyal to the brands which their employers handled (RX 72W–Z19). Insofar as the inclusion of dealers on the Litton lists is concerned, this is a basic defect with the Litton surveys, as noted above, but it does not warrant broadening the universe to include all such servicing-dealers. This is particularly true where the weight of the evidence indicates the proper universe to be the narrower one, as in this case.

77. A second alleged defect urged by complaint counsel is termed the "bias of non-response."[18] Based primarily on [30]Litton submissions to the Commission during the investigation of this matter, complaint counsel argue that the response rate to the commercial survey was 42% and the response rate to the consumer survey was 47% (CPF 165 et seq.). These response rates were obtained by simply dividing the number of "completed calls" (where a qualified technician was reached who would answer all of the questions) into 500 (the number of agencies on each list). Complaint counsel argue that such admissions by respondents are binding and cannot be rebutted (CPF 167).

78. The latter argument is pure nonsense. If respondents mistakenly admitted black was white in response to a Commission investigative demand it would not make it so. The fact is that the term response rate can be used in a number of different ways. Respondents, in answering complaint counsel's investigative demands obviously thought they were being asked how many technicians responded to the survey who were qualified and willing to

[18] The "bias of non-response" refers to the possibility that the non-respondents to a survey (those who are missed for some reason) might differ in their answers from those who did respond (Miller, Tr. 574–75). Tests to determine the extent of such possible bias become necessary in the opinion of complaint counsel's experts, when there is a low response rate, since the possibility of bias in the survey is then substantial (Miller, Tr. 572–75, 577–78; Sudman, Tr. 1716).

answer the preference questions (CX 308–Z006–Z007). The testimony of two of complaint counsel's own experts indicates that this may not be the proper way to determine response rate if one is trying to determine whether there may be a "bias of non-response". That testimony and the testimony of respondents' experts shows that certain other data must be considered in determining response rate from a statistical point of view (Miller, Tr. 668–90; Fink, Tr. 1440–41, 1452–56, 1465–73; Roshwalb, Tr. 3378–80, 3381–83; Zeisel, Tr. 4139). For example, agencies contacted which were not qualified to answer the questions (did not repair microwave ovens, serviced only one brand of ovens, had not repaired such ovens for at least one year, etc.) were obviously responses, even if they did not properly belong in the universe being surveyed. It is certainly inaccurate to classify such agencies as non-respondents.[19] [31]

79. The only evidence of record which attempted to clarify this confusion in terms, as to actually what was the non-response rate in a statistical sense, was the testimony of respondents' experts. Mr. Roshwalb and Dr. Zeisel computed what they considered to be the proper response rate of the Litton surveys to be 63% for the consumer survey and 65% for the commercial study (Roshwalb, Tr. 3378–80, 3381–83; Zeisel, Tr. 4139). The testimony of complaint counsel's own expert, Dr. Miller on cross-examination, confirms the propriety of their logic (Tr. 668–90).

80. The testimony of Dr. Zeisel further indicates that these latter response rates were within the normal range of responses to surveys of this kind and, therefore, would not raise the spectre of a possible "bias of non-response" (Zeisel, Tr. 4139–40). There being no reliable evidence of record to the contrary, this opinion must be credited. Therefore, the rate of response to the two Litton surveys is found to be not abnormally low and does not present a substantial probability of bias.

81. Complaint counsel also argue that the Litton surveys were biased because they were based solely on LMCP's own lists of authorized service agents. It is their position that such "authorized agents" were likely to be biased in favor of the brands for which they were authorized (CPF 137 et seq.). While there is some validity to this position (See Finding 63, *supra*), the basic problem it poses is subsumed by the defect I found above, that Litton failed to sample in some way the "100" additional agencies that were repairing Litton ovens but were not on the authorized lists. Thus, I do not find this,

[19] For instance, in the commercial survey CRI contacted 93 agencies which serviced only one brand (CX 308B). The interview was completed for this survey's purposes once that fact was established.

the interview of authorized technicians only, to be a separate, substantial defect in the Litton studies.[20] [32]

D. *The Chilton Survey*

82. As part of their case-in-chief, complaint counsel introduced a survey designed to show that the universe of independent microwave service agencies was vastly larger than the 600 or 700 agencies claimed by respondents. This survey was conducted for complaint counsel by Chilton Research Services, a survey research firm located in Radnor, Pennsylvania (Fink, Tr. 1345–46, 1352–53).

83. The basic materials for the Chilton survey were provided by the Commission staff, *i.e.,* a list of agencies and the questionnaire. Chilton Research Services (Chilton) then conducted the interviews, tabulated the results and made certain findings (Fink, Tr. 1352–55). A report was then submitted to the Commission staff transmitting those findings (CX 280A–Z180; Fink, Tr. 1352–53).

84. The sampling frame for the Chilton survey consisted of about 3,699 agencies. The list of names, as provided by Commission staff is in evidence as CX 278. Dr. Fink, who was in charge of this survey at Chilton, was informed by Commission staff that this list included agencies which were likely to have repaired appliances, including microwave ovens, in 1976. He also understood that the list might be as much as three years old (Fink, Tr. 1355–56).

85. Chilton then followed a simple random sampling technique in setting up and conducting telephone interviews. It was expected that the sampling would produce about 500 interviews. The purpose was to determine a percentage of agencies which were servicing multiple brands of microwave ovens in 1976, with one of them being Litton. That percentage would then be projected to the universe (the list of 3,699 agencies) to obtain an estimate of the approximate number of those agencies within the total universe (Fink, Tr. 1356–58, 1362–63; CX 280A–Z180).

86. The Chilton survey resulted in liberal and conservative estimates, both of which would indicate that Litton had greatly underestimated the number of independent service agencies which were not on the Litton lists, but which would have been servicing Litton and at least one other brand of microwave oven in 1976 (CX 280A–Z180).

87. The Chilton survey results are not reliable and probative for

[20] Moreover, the bias of authorization would be impossible to completely escape in the Litton surveys. To the extent the universe is limited to agencies servicing two or more brands of ovens (one of them Litton), it will of necessity be comprised mainly of agencies authorized to service Litton ovens. Thus, it makes no sense to divide the question of authorization from the basic problem that the unlisted (unauthorized) "100" were not surveyed.

a number of reasons. The principal one is that the list which comprised the universe for the survey was made up in great part of servicing-dealers (Niemasik, Tr. 1312–13; RX 72B–S). As noted in Findings 42 and 76, *supra,* such servicing-dealers are not properly a part of the universe in the Litton surveys. The substantial extent of inclusion of such servicing-dealers in the Chilton survey taints its results and makes its conclusions irrelevant to this proceeding (RX 72B–S). [33]

88. Among other reasons why the Chilton survey is defective is the lack of consistency and reliability in the universe upon which it was based. The exhibits underlying CX 278 (the universe for the study) were vastly different in make-up and the time periods for which they were applicable (Niemasik, Tr. 1244–56; Jadwin, Tr. 837–68, 925–27; Wooden, Tr. 944–50, 991–95, 998–1010; Carmen, Tr. 1142–48). The GE list, for example, was a computer listing of service agencies franchised to service all GE appliances in 1978 (Carmen, Tr. 1158).[21] From this list Commission staff allegedly eliminated most servicing dealers in preparing CX 278. This was done because of the great number of agencies listed on the GE computer listing (Niemasik, Tr. 1301–03). The Sharp and Magic Chef lists were both prepared by these companies for complaint counsel's use in this case and were not records kept in the ordinary course of business (Jadwin, Tr. 837–45; Wooden, Tr. 944–47). Both included servicing-dealers (Jadwin, Tr. 837–49; Wooden, Tr. 950–51). The Sharp list was made from a computer run listing all Sharp service agents. The computer run was prepared in February 1977 and represented Sharp's service network in December 1976 (Jadwin, Tr. 834–37, 858–60). The Magic Chef list was compiled from that company's service contract file as of June 30, 1976 (Wooden, Tr. 946–47). Both Sharp and Magic Chef had published lists of service agencies which were packed into their microwave ovens when sold to the public. In each instance such published lists varied substantially from the lists prepared for complaint counsel for use in this case (CX 175, 243, 245, 53–54, 56; Wooden, Tr. 1009–10). In addition, it was noted in the cross-examination of Mr. Jadwin that there were very substantial differences between the Sharp published list for 1976 and a later Sharp list published in 1977 (Jadwin, Tr. 910–21). This indicates a substantial change in Sharp's service network was taking place in 1976–1977 (See also, Jadwin, Tr. 928–29). It was also shown that GE's service network was vastly different from those of Sharp and Magic Chef. GE's service network in 1976 was primarily composed of its

[21] This list was not compiled by GE but by Wahlstrom & Company which handles GE's yellow page advertising for all product services (Carmen, Tr. 1131–42).

own GE factory service operations. At that time it had 115 to 120 factory service locations. Only in the areas outside the boundaries of these locations did it franchise other servicing agencies (Carmen, Tr. 1109–12). These were among the facts I considered when I stated, upon accepting CX 278 (the [34]Chilton universe) into evidence, that this exhibit does not show who was servicing microwave ovens in 1976, nor that the agencies listed might have qualified for the Litton surveys. CX 278 was received solely because it provided the universe for the Chilton survey (Tr. 1339–41), and the Chilton survey is subject to any infirmities that may be inherent in such list.[22]

89. Moreover, the cross-examination of Dr. Miller, one of complaint counsel's experts, casts further doubt upon the validity of CX 278 as a proper universe for the Chilton survey. Using a hypothetical approach, Dr. Miller was questioned concerning the disposition totals in a survey entitled "Color Television Services Technician Survey Conducted by ABC Corporation" (RX 75)—the disposition totals therein were virtually identical to those in the Chilton survey (RX 75; CX 280–Z003). Dr. Miller testified that the number of unlisted, wrong numbers and non-working number agencies on RX 75 was much too high and created a "red flag" in his mind suggesting that the underlying list in the survey was defective (Tr. 687–88). He indicated that if you have a good list to begin with the number of non-working or wrong numbers should be quite small. He added that when his company got a bad list, it did not accept it. It went out and got a better frame for the sample (Tr. 688–90). These remarks necessarily reflect on CX 278 as well, since RX 75 and the Chilton survey results are practically identical. This gives additional substance to the problems raised above concerning the three lists underlying CX 278.

90. In spite of such disparities revealed on the record, complaint counsel have submitted no substantial evidence to support the validity of the universe used in the Chilton survey, that is, to show that CX 278 was of such a character that projections could be made to it based on the results of the Chilton survey. The testimony of complaint counsel's own experts indicates that there should be a certain consistency to [35]a universe or population of a survey, so that the results of that survey might be generalized to the total population (Miller, Tr. 474–75; Sudman, Tr. 1666; Fink, Tr. 1432–36;

[22] The statement that CX 278 does not show who was servicing microwave ovens in the Spring of 1976, nor that of any of the listed agencies might have qualified for the Litton surveys applies equally as well, of course, to the underlying lists—CX 243, 245 and the GE computer run. In addition, CX 241 (a list of Amana service agencies) suffers from the same defects—in that it included servicing dealers and it was not proven that the agencies therein serviced microwave ovens in the Spring of 1976, nor that the listed agencies would have qualified for the Litton surveys (Moore, Tr. 1850).

See also, Roshwalb, Tr. 3630–31). Yet, Dr. Fink who conducted the Chilton survey was not able to vouch for the quality of the universe used in that survey. When asked whether he had a list that would give him a universe from which he could get usable responses, Dr. Fink specifically denied any responsibility for the quality of CX 278. In fact he testified:

> Well, we merely were charged with the responsibility for taking the list that was given us, regardless of what its source was, and identifying agencies on there that serviced Litton and one other brand . . . professionally we were not asked to comment on the quality of the list or what it represented (Tr. 1432).

Complaint counsel have offered no other expert to testify as to the quality of CX 278, nor the propriety of its use as a universe for the Chilton survey; despite my comments concerning some obvious problems with CX 278 when it was received in evidence (Tr. 1339–41). There is simply no reliable evidence of record that CX 278 was as was represented to Dr. Fink—a list containing the names of agencies that were "likely" to have repaired microwave ovens in 1976 (Fink, Tr. 1356). Without such a showing the Chilton survey could not be given much weight, even if it were not tainted by the inclusion of servicing-dealers.

91. Another problem with the Chilton survey is its failure to establish that all of the interviewees had repaired microwave ovens for at least one year prior to 1976 (CX 280H–J). Since this was one of the qualifying factors in the Litton surveys (Finding 46, *supra*), the omission of this question prevents any determination that all of the tabulated Chilton interviewees would have been eligible for the Litton universe, even if there were no other faults with such survey.

92. Under all of these circumstances the Chilton surveys must be considered irrelevant and lacking in probative value.

IV. CAPACITY TO MISLEAD MEMBERS OF THE CONSUMING PUBLIC

93. The advertisements at issue herein received substantial dissemination to the public (Findings 7–10, *supra*). They were [36]of a type which could be expected to have a substantial impact on consumer buying decisions. They called to the consumer's attention the purported expertise of a class of professionals—independent service technicians—who could be expected to have a peculiar insight into the comparative quality of Litton ovens and the leading competitive ovens. Moreover, such advertisements indicated that the preferences of these experts was established as the result of a survey. While there may be some consumer skepticism regarding surveys conducted for commercial establishments (Sudman, Tr. 4519–20), the

term "survey" strongly implies that the characteristics of the sample taken can be used for drawing inferences about the characteristics of the entire universe (Miller, Tr. 475). In other words, the technicians contacted in the "survey" are representative of a broader base of independent service technicians who service microwave ovens.[23] Even with a certain amount of reader skepticism, such a representation can be expected to have an impact on some readers of the advertisements and to cause them to purchase a substantial quantity of Litton microwave ovens.

V. VIOLATIONS

94. Having found: (1) that respondents made certain representations in advertisements which received substantial dissemination, in commerce (Findings 7 through 33); (2) that Litton's surveys did not provide a reasonable basis for such [37]representations as claimed in such advertisements (Findings 52 through 74); (3) that the further representation in such advertisements to the effect that certain preferential claims were proven by the Litton surveys was false and misleading (Finding 74); (4) that such representations had the capacity and tendency to mislead members of the purchasing public into the purchase of substantial quantities of microwave ovens manufactured by LMCP (Finding 93); and (5) that Litton was and is in substantial competition in commerce with other firms engaged in the sale and distribution of microwave ovens similar to those produced by Litton (Finding 6); it necessarily follows that I find that there have been violations of Section 5 of the Federal Trade Commission Act, as charged in the Complaint.

95. In so finding, it should be noted that two of the substantial defects in Litton's surveys which are found hereinabove were not among the four specified defects set forth in Paragraph Ten of the complaint (Findings 58 and 66–68; Complaint Para. Ten). However, Paragraph Ten clearly is not limited to the specific defects enumerated therein. In fact, it charges that the Litton surveys do not prove certain representations of the Litton ads "for reasons including *but not limited to* the . . ." four specified problems (Emphasis added). Moreover, the issues were broadened during pretrial proceedings to

[23] A careful reading of Dr. Ward's testimony for respondents shows that he carefully avoids stating categorically that consumers do not "project" the results of a "survey" to a larger group (Tr. 3981–86). Rather, the tenor of his overall testimony is that the readership of the Litton advertisements would be an "up-scale" clientele which would be particularly immune to the blandishments of such ads (Tr. 3984–85). It is obvious that Litton did not believe this to be the case or such advertisements never would have been published. Further, I am not able to give full credit to such testimony in view of the nature of the representations in Litton's ads. Even Dr. Ward noted that these advertisements provided far more information about the nature of the study done than is provided in much consumer advertising (Ward, Tr. 3983). Such additional information could be expected to have a greater impact on the reader than a bold assertion that "three out of five doctors . . ." recommend (Ward, Tr. 3983).

spell out a number of additional defects complaint counsel would raise under the broad language of Paragraph Ten (Statement of Issues, filed June 27, 1979).[24] The record of the pretrial proceedings and the subsequent trial herein make it evident that the issues of whether servicing-dealers were properly a part of the universe for Litton's surveys and whether the surveys were made of agencies rather than technicians, as represented in the ads, were squarely before me and fully tried.

96. In fact, aside from the Statement of Issues, the question of the inclusion of servicing-dealers in the Litton surveys was raised in pretrial in complaint counsel's Request [38]for Admissions and Interrogatories of respondents (Response to Request for Admissions, filed July 5, 1979, pp. 33–34; Answers to Interrogatories, filed Sep. 10, 1979, No. 59), and a substantial portion of respondents' evidence in the case-in-defense was directed to the question of whether servicing-dealers were properly a part of the universe for the studies (e.g., Seitz, Tr. 2335–37; Omstead, Tr. 2519–20; Winters, Tr. 2660; Houserman, Tr. 2787, 2790–91, 2930–34; Roshwalb, Tr. 3587–88; Zeisel, Tr. 4110; RX 72A–Z18).[25]

97. Respondents also successfully blocked complaint counsel's attempts to ascertain the exact number of dealers included on Litton's authorized service agency lists. Complaint counsel's application for subpoenas *duces tecum* directed to Litton's 54 distributors was denied on the ground that complaint counsel had already carried their burden of showing that respondents' lists may have included a substantial number of dealers (thus indicating that respondents did not have a reasonable basis in their surveys for the advertisement claims). (Application for 54 subpoenas, dated November 28, 1979; Order Ruling on Respondents' Opposition . . ., Dec. 6, 1979.) In view of the pretrial notice that the purity of the Litton lists was being questioned and the fact that respondents blocked the one attempt to establish the exact number of dealers on those lists, it is clear that respondents chose to leave the record in the state it is now found. Therefore, my findings of these defects and a consequent violation based partly thereon are within the framework of the complaint, the notice to respondents and in conformance with the evidence of record.

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[24] The Statement of Issues questioned the propriety of Litton's "sample of independent technicians," and urged that if a proper sample had been drawn the results would have been different (Issue II.A.f, p. 5). It also questioned Litton's failure to sample properly from within the "universe of independent technicians," as opposed to Litton's simply contacting each agency (Issue II.A.d, p. 5; *see also* Ward, Tr. 3787).

[25] Respondents proved quite effectively that servicing-dealers did not belong in the universe, knowing full well that their own lists contained servicing-dealers. They can't have it both ways—the Chilton Survey can't be wrong because it includes servicing-dealers and the Litton surveys still be right.

VI. RESPONDENTS' EXCEPTIONS TO THREE OF MY RULINGS

98. Respondents allege there was substantial error on my part in three of my rulings concerning discovery and the admissibility of evidence. First, respondents allege that I erroneously denied them discovery of certain coding information in connection with two surveys which complaint counsel then intended offering in evidence, the Chilton Survey and the Bee [39]Angell Survey (not offered), thus denying them of substantial evidence crucial to their case on defense (RPF, pp. 76 et seq., n.9). Secondly, it is stated that I erroneously rejected RX 86, on the ground that it had not been noticed as a respondent exhibit, even though it had previously been noted as one of complaint counsel's proposed exhibits and despite the fact it was to be used in cross-examination of a witness called by complaint counsel (RPF, p. 41, n.4). Finally, respondents take exception to my exclusion of Wave 1 of RX 72 on the ground that complaint counsel had not been provided with underlying documentation in violation of pretrial orders. In the latter argument it is urged that I was inconsistent in that I did not exclude several of complaint counsel's exhibits despite the fact respondents did not get access to underlying documentation. None of these exceptions have any merit.

99. The denial of access to the codes for the Chilton and Bee Angell surveys was based on a balancing of the public interest in preserving the reliability of survey data through the protection against disclosure of confidential survey data, as compared to the needs of respondents. (Order of June 19, 1979, p. 9.) Subsequent events at the hearing herein proved such ruling correct. Respondents had no trouble proving that the interviewees in the Chilton Survey included a substantial number of servicing-dealers (Finding 87, *supra*). In fact, complaint counsel readily admit to that fact. Nor, did respondents have any difficulty proving other substantial defects in the Chilton study (Findings 88 through 91, *supra*).[26] The Bee Angell study was not even offered in evidence, so there could be no prejudice in this regard. [40]

100. Respondents also imply, however, that the denial of such

[26] Moreover, respondents fail to note the wealth of underlying data they did have in connection with the Chilton study, which enabled them to make such an effective attack on that survey. They were provided with the following: The survey reports plus any errata or clarification sheets; all tabulations; all questionnaires, fully intact except for the code numbers which would identify the name of the interviewee in each instance; lists containing the names and addresses of all agencies in the universe; the sample drawn by Chilton, with identification of all agencies who were actually interviewed; the names of the telephone interviewers and supervisors for the survey; the identity, background and training of the responsible researchers of Chilton; and all documents which Dr. Fink stated were underlying materials for the survey. (Order of June 19, 1979, pp. 2-3.) In the case of the last items, it was discovered on cross-examination that there might have been some additional hand-written notes and papers in Chilton's files which Dr. Fink had not considered backup papers and which he did not turn over to complaint counsel for disclosure to respondents. Dr. Fink was ordered to search his files and turn over any such materials to respondents (Tr. 1538-42).

code for the Chilton survey in some way prevented them from proving the exact size of the group of unauthorized agencies who would have qualified for the Litton survey, but were not on the Litton lists (the missing "100") (RPF, n.9, p. 77). However, in view of the problems found herein with the universe for the Chilton survey, all of which defects have been strenuously urged by respondents, I find that such study could not have provided a basis for a more exact determination of the size of the additional group of agencies which were not included in the Litton surveys. In fact, aside from the defects found in the Chilton survey and its underlying lists of service agencies, it must be noted that such survey was not based on service lists from all of Litton's competitors. It is to be assumed that if service agencies authorized for all of the numerous other competitive brands were available, there would be additional agencies revealed which might belong in the Litton universe.

101. The exception to my rejection of RX 86 is equally as erroneous. Respondents' argument in footnote 4 of page 41 of their Proposed Findings omits certain salient facts, including the main basis for my ruling. The witness being questioned in this instance was Mr. William Wallace George, the president of LMCP at the time the challenged advertisements were run (Tr. 1941). He was called as complaint counsel's witness, but his questioning on direct was quite limited in scope—dealing with the involvement of Litton industries, Inc., in the day-to-day affairs of LMCP (Tr. 1941–2021). On "cross-examination" respondents' counsel went well beyond the scope of the direct questions; over complaint counsel's objections. I overruled complaint counsel's objections and permitted such questioning with the express notice to respondent's counsel that, where he did so, he was making the witness his own (Tr. 2024–25). Mr. Adair at the point of questioning involved in respondents' present exception, was clearly exercising his permission to put in some of his defense during complaint counsel's case and was, in fact, engaged in the direct examination of Mr. George [41](Tr. 2085–88)—who had also been noted as one of respondents' witnesses on its defense (Respondents' Witness List.) The document in question was an internal communication between Litton officials concerning the then on-going dealings with the Federal Trade Commission staff. It contained a number of obviously self-serving statements and was not a document noted by respondents on their proposed exhibit lists (Tr. 2085–88). It was rejected primarily because it was a self-serving statement with no substantial probative value and, secondarily, because it was being offered on the direct examination of one of respondents' noticed witnesses, without having been noted on the exhibit list in accordance

with the pretrial orders controlling the conduct of this hearing (Tr. 2088). Such ruling was correct and proper.

102. The third ruling in issue similarly involved a direct and deliberate violation of a legitimate pretrial order and was correct and proper. It is important to notice that respondents do not deny violating pretrial orders to disclose underlying records and documentation for Wave 1 of RX 72. Rather, it is their contention that my ruling was erroneous because it was inconsistent, in that I allegedly had allowed in other exhibits offered by complaint counsel without requiring the underlying documents to be turned over to respondents (RPF 96–98; RRB, pp. 127–28). The latter allegation is simply false. Respondents refer to the records underlying CX 241, 243 and 245—lists of service agencies (including servicing-dealers) allegedly authorized to service Amana, Magic Chef and Sharp ovens, respectively. In the first place, to the extent any such underlying documents existed they were in the hands of third parties, *i.e.*, Amana, Magic Chef and Sharp, rather than complaint counsel. Therefore, the question was not one of holding respondent to a higher standard of conduct under pretrial orders than was applied to complaint counsel. And secondly, all of such underlying documents were either available to respondents through pretrial discovery, or non-existent. In the case of CX 241, the document itself was an original business record, but there were notations made on such document based on other records. Those notations had not been placed on CX 241 for purposes of this litigation, but for Amana's own purposes, some years prior to the hearing herein. The records on which such notations were based were destroyed prior to the date respondents' subpoena *duces tecum* was served upon Amana in this proceeding (Moore, Tr. 1844–51). There were no longer any underlying documents to be discovered. CX 241 was, therefore, allowed into evidence noting this fact, among others, as detracting from the weight that could be given to such exhibit (Tr. 1850–51). In the case of CX 243 and 245, respondents were granted subpoenas *duces tecum* which contained specifications directed toward obtaining documentation underlying these two [42] exhibits; both of which had been prepared by competitors of Litton at complaint counsel's request for use in this litigation (Specifications 3 and 4 of Magic Chef subpoena; Specifications 3–5 of the Sharp subpoena). If respondents did not obtain access to such documents under these subpoenas I must assume it was their own fault. No application was made to me seeking enforcement of these provisions of the subpoenas.

103. Accordingly, respondents' argument that I was inconsistent in this regard in requiring respondents to adhere to pretrial orders

requiring disclosure while not requiring similar disclosure to respondents, is simply false. Moreover, respondents' failure to comply with such legitimate order was particularly egregious. Respondents' witness, Mr. Houserman had compiled a summary list of certain data from LMCP's records between the date of his deposition by complaint counsel and his testimony at trial. The underlying records were not available in the courtroom and complaint counsel had not been made aware of the summary or the documents from which it was compiled. Complaint counsel then were given no access to the underlying records and were not in a position to cross-examine concerning such summary data (Tr. 2874–96). When Wave 1 of RX 72 was later offered in evidence based on such summary data (the Houserman summary was not itself offered in evidence) I had no choice but to enforce the pretrial orders of Judge Howder (my predecessor in this case) and myself. There is certainly no similarity between this action and my receipt in evidence of CX 241, 243 and 245 under the circumstances outlined above.

VII. DISCUSSION

A. *Proof in Ad Substantiation Cases*

This is a fairly standard "ad substantiation" case. As such, there is a well-established body of case law governing the burdens of proof and elements of a violation herein. As the Commission stated in *Pfizer, Inc.,* 81 F.T.C. 23, 62 (1972), "it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim" (Emphasis added). This same conduct has also been found by the Commission to be a deceptive practice within the meaning of Section 5 in later cases such as, *National Dynamics Corporation,* 82 F.T.C. 488, 549–50 (1973), *affirmed,* 492 F.2d 1333 (2d Cir., 1974), *cert. denied,* 419 U.S. 993 (1974). *See also, Firestone Tire and Rubber Co.,* 81 F.T.C. 398, 449, 452 (1972) and *Crown Central Petroleum Corp.,* 84 F.T.C. 1493 (1974). [43]

The burden of proof and the issues involved in such cases are best spelled out in the *National Dynamics* case, *supra.* There the Commission stated, "We have held that the test applied to determine the adequacy of substantiation is whether or not it [the substantiation for the advertised claims] provides respondents with a reasonable basis for believing their claims are true. The issues thus raised under this test appropriately involved a consideration of the reasonableness of the advertiser's action and his good faith" (at 553). As to the type of substantiation required under the "reasonable

basis" issue, the Commission has stated that ". . . the type of substantiation required to satisfy the reasonable basis standard would depend on the facts of each case." *Crown Central Petroleum Corp., supra,* at 1548.

In light of these basic principles it was complaint counsel's burden to prove that at the time Litton caused the advertisements in question to be published, it knew or should have known that its substantiation was defective and did not provide a reasonable basis for such advertisements.[27] My findings above show that complaint counsel met that burden. In fact, the experience in marketing and market research of LMCP's marketing staff (George, Tr. 2030–31; Wilkie, Tr. 3722–27) which was responsible for the formulation of the Litton surveys (CX 145B, 248, 305A, and 308E–J) emphasizes this fact.

These experienced personnel knew or should have known that the substantiation for their advertisement claims was defective where:

1. They intended to survey technicians who were free of any biasing influence through relationship to a manufacturer or a dealer, but they were on notice that the lists used as a [44]universe for their surveys were tainted by the inclusion of servicing-dealers;

2. They knew that one-sixth, or more, of their defined universe was not included in the survey and that this group of authorized agencies might differ in preferences from Litton's authorized agencies;[28]

3. They knew they had surveyed agencies, not technicians, but their advertisements referred to a survey of technicians; and

4. They knew that a number of the technicians interviewed had volunteered remarks indicating they did not have adequate experience, with some brands mentioned, in order to allow them to make preferential comparisons; and that such remarks might be symptomatic of a much broader group of the interviewees, since the surveys asked no questions which would qualify respondents as to their relative familiarity with different brands mentioned (See n.28).

Each of these facts should have been sufficient to cause grave

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[27] In this regard, respondents have introduced in evidence studies prepared by its experts for use in this litigation and other data which were not in their possession at the time the ads were published (*e.g.*, RX 10 and 72). It is complaint counsel's position that such data, to the extent they attempt to prove the validity of the Litton surveys, are irrelevant because such information could not have provided a reasonable basis for Litton's claims at the time of publication (CRB, pp. 21 et seq.). The case law cited above would appear to support this position. However, in the event such data had proven that the Litton studies were error-free and valid, it certainly would have had a bearing on the public interest in bringing this proceeding and the issuance of an order herein.

[28] LMCP personnel were well aware that familiarity with a particular brand would weigh heavily on the preferences of the individual technicians polled. In an internal Litton memorandum, one LMCP official noted, ". . . the assumption being that if a technician services a particular brand he is most likely to prefer it . . . ." (CX 239B)

doubts in the minds of LMCP's officials as to the reasonableness of their basis for the advertising claims. Furthermore, such doubts should have been reinforced by the fact that the surveys were not originally intended or designed to serve as the basis for advertisements. They were initially intended only for internal use at LMCP. With this fact in mind, the Litton officials should have taken a very careful look at the surveys and their results before putting them to a use for which they were not intended. This fact alone would put Litton on notice of the defects in their studies; if the obvious defects listed above did not come to their attention previously.

Such facts specifically negate both the "reasonableness of the advertiser's action" and its "good faith". Therefore, the burden of proof spelled out in *National Dynamics* has been met. [45]

B. *The Meaning of the Advertisements*

My findings above, concerning the representations made in the Litton advertisements, are essentially the same as the representations set forth in Paragraphs Six through Nine of the complaint.[29] My support therefor is the plain wording of the advertisements and the fact that such interpretation is a reasonable one. Such interpretation is one which a substantial number of readers, whether sophisticated or not, were likely to have made when they read the Litton advertisements. The law is quite clear that under such circumstances there was no need for any further empirical evidence as to what the ads represented to the public, *Giant Foods, Inc.,* 61 F.T.C. 326, 347, n.2 (1962). The appropriate test is whether the interpretation of the ads set forth in the complaint and found herein is a reasonable one, *National Dynamics Corporation, supra,* 82 F.T.C. at 548, and that test has been met.

Respondents' expert, Dr. Ward, characterized the audience for the Litton advertisements as "sophisticated", "upscale", "well-educated" and "wealthy" (Ward, Tr. 3972–73, 3988–90). Respondents have offered no proof that the readers of *Better Homes and Gardens, Newsweek, Sunset* and *Time* magazines and the major newspapers published in the cities named in Finding 8 fit such description. Moreover, even a "sophisticated" reader would not be so well versed in electronics that he would place no value on the preferences of a body of experts (service technicians) in making a purchase decision

[29] The only differences between my findings and the charges of the complaint are that I did not find that respondents misrepresented the surveys as being "independently" conducted by Custom Research, Inc. (Findings 35–37) and I did not agree with complaint counsel's definition of "independent microwave oven service technicians." In connection with this latter difference, I further limited the representations to independent microwave oven service technicians who serviced Litton and competitive microwave ovens; although, in doing so, I noted that some of the local advertisements made a broader representation (Findings 21, 29, 18 and 19).

on such a complex appliance as a microwave oven. Dr. Ward's testimony concerning reader interpretation of the ads was not based on empirical evidence of consumer perception, but only on his own generalized experience as an academic working in the field of marketing behavior (Ward, Tr. 3959–70). Under the circumstances, it is of little probative value in the face of the plain wording of the advertisements. *Crown Central Petroleum,* 84 F.T.C. 1493, [46]1524, 1540 (1974); *Firestone Tire and Rubber Co.,* 81 F.T.C. 398, 454 (1972).

Furthermore, a sophisticated readership, as posited by Dr. Ward, would be more likely to be appreciative of survey methodology. Such readership would be even more aware that the results of a survey can be generalized to a broader universe of service technicians than the group actually questioned in the survey. See *Bristol-Myers Co.,* 46 F.T.C. 162, 173 (1949). They are likely, therefore, to be more affected by the representations of the advertisements than a less knowledgeable readership.

However, it must also be noted that respondents' advertising was not limited to the readership of the magazines mentioned above, the *Wall Street Journal,* a few trade publications and a number of leading newspapers in major cities (Findings 8 and 9). As noted in Finding 10, above, advertisements containing all, or part, of the textual material disseminated by Litton to its distributors and dealers appeared in at least 109 local advertisements (106 print and 3 radio) in 26 states across the country. This was in addition to Litton's own national advertising campaign. Litton assisted in the payment of all or part of the cost of at least 41 of such advertisements (the cooperative advertising program), including many which did not contain the full text of the Litton "slicks" and which were, therefore, even more deceptive than the national advertisements (Findings 18 and 19, *supra*). But, whether Litton cooperated in the payment for such advertisements or not, it certainly provided the instrumentality to each of these advertisers through which misrepresentations were made to the public (Findings 10 through 13, *supra*).[30] It is well established that one who puts into the hands of others the means by which such others may deceive the public is equally as responsible for [47]the resulting deception. *Federal Trade Commission* v. *Winstead Hosiery,* 258 U.S. 483, 494 (1922); *Regina Corp.* v. *Federal Trade Commission,* 322 F.2d 765–768 (3rd Cir., 1963); *Waltham Watch Co.* v.

[30] Respondents have misstated my rulings concerning the admission of such advertisements (RRB, pp. 14 et seq.). My rulings at Tr. 358 and 378–79 make it quite clear that I was receiving advertisements not paid for by Litton and which only contained a part of the materials supplied by Litton in its "slicks", on the basis that Litton "created the instrumentality which was the basis for the various advertisements and in this way participated in the dissemination of such information through news media, the various news media indicated on those particular exhibits" (Tr. 358). Consistent with this, I rejected some advertisements which contained no data concerning the Litton surveys (Tr. 362–64).

Federal Trade Commission, 318 F.2d 28, 32 (7th Cir., 1963), *cert. denied,* 375 U.S. 944 (1963); *C. Howard Hunt Pen Co.* v. *Federal Trade Commission,* 197 F.2d 273, 281 (3rd Cir., 1944). Litton is, therefore, responsible for the representations made in all of the local advertisements, as well as those in its own national advertising program. It can hardly claim any special, "upscale" readership for such local publications.

Under such circumstances the representations alleged in the complaint and found herein, and Litton's responsibility therefore, have been established by the weight of the evidence.

VIII. THE ORDER

A. *Necessity for an Order*

Having found a violation it is necessary to consider whether an order should issue and, if so, what its provisions should be. Although respondents showed a certain amount of cooperation with Commission staff in halting the advertisements and revising the copy thereof, their cooperation was far from perfect. The first advertisement was placed in October 1976 and complaint counsel contacted respondents shortly thereafter, in November 1976 (Tr. 3945). Respondents started curtailing their advertising in December of 1976, but published an additional commercial oven advertisement in January 1977 and an additional consumer microwave oven ad in February 1977. A revised consumer ad (CX 3) was placed in August 1977 and revised commercial oven ads (CX 6) were published during the period August through October 1977 (Tr. 3946).[31] In the meantime, local advertisements placed by Litton oven dealers were being run during the period September 1976 through February 1978 and Litton continued to cooperate in the cost and dissemination of many of these ads (Finding 10).

Litton's violations herein were certainly not inadvertent. My findings hereinabove show that its misrepresentations were [48] made despite clear indications that it did not have a reasonable basis to make such claims (Findings 52 through 74). Through the rulings in cases such as *National Dynamics, Pfizer,* and *Crown Central Petroleum, supra,* it was on notice that it must have such a reasonable basis if it were to make advertising claims of this sort. Further, it only ceased running such advertisements after being contacted by the Commission staff and, even then, its cooperation was somewhat less than perfect. Under the circumstances, it is clear

[31] Although there was some improvement in the revised advertisements, they continued to include a number of misleading representations (Findings 22 and 30).

that an appropriate order should be issued in this case. *Coro, Inc., et al.,* 63 F.T.C. 1164, 1201 (1963).

The only questions remaining are: what provisions should be included in the order; should Litton Industries be included in the order; and what products should the order cover?

B. *The Provisions of the Order*

Complaint counsel propose an order which is very particularized and far-reaching in its requirements. It, among other things, would require respondents to have in their possession "competent and reliable scientific surveys or tests and/or other competent and reliable evidence" before making representations such as those in the advertisements involved herein. (Par. 1 of Proposed Order, CPF, p. 95.) Other provisions of the proposed order go into great detail in the manner in which future tests or surveys must be conducted and the qualifications of those who may conduct them (CPF, pp. 95–97). Complaint counsel have offered no expert testimony or other evidence as to the necessity for, or propriety of, such provisions, despite the fact that respondents' expert, Dr. William K. Wilkie, has offered some formidable testimony in opposition to most of these requirements.

Dr. Wilkie has pointed out a great number of ambiguities and problems with the order as proposed by complaint counsel. His testimony indicates that many of the provisions of such order would likely inhibit a great deal of legitimate comparison advertising (Tr. 3714–20, 3721–23, 3728, 3734, 3737–38, 3740, 3743). Complaint counsel have not adequately rebutted such testimony.

Most of complaint counsel's order provisions appear to be based on the theory that there are clearly defined and generally accepted procedures and practices in the market research field, which must be followed if a market survey is to have any validity. The evidence, however, does not support this position. Respondents' experts have testified that there is no single, unified body of generally accepted procedures in the [49]market research field (*e.g.,* Wilkie, Tr. 3728–29). Complaint counsel's experts have not contradicted this position. In fact, Dr. Sudman indicated that he was not familiar with the general practices in a large segment of market research—that done for private organizations (Tr. 4517–18).

In short, I find no record support for the many innovative order provisions proposed by complaint counsel. Where a proposed order goes so far afield of prior orders in adjudicated cases, some evidence, expert testimony or other, should be offered to support the need and

propriety of such provisions, but this was not done in this case. I am left with a record which does not reveal a need for order provisions other than the customary order to cease and desist from the practices found to be violative of the act. Moreover, there is some evidence that the other provisions proposed by complaint counsel may be anti-competitive, in that they may inhibit legitimate comparison advertising. Consequently, the order attached hereto does not contain such provisions.

I do find, however, that written records, especially written interviewer instructions in connection with any future market surveys, would be very helpful in compliance procedures relating to the order entered below. Having been found in violation of Section 5 of the Federal Trade Commission Act, it is incumbent upon Litton to be prepared to demonstrate the reliability of any product comparison claims which it might make in future advertisements. Such record keeping need not be as broad, however, as that proposed by complaint counsel in Paragraph Six of their proposed order (CPF, p. 97). The expense of making comparison shopping claims should not be made so great that even legitimate advertising of this type is squelched. The order provision below is, therefore, modified accordingly.

C. *Litton Industries*

Complaint counsel propose that the order herein be directed to Litton Industries, Inc., as well as against Litton Systems, Inc., of which Litton Microwave Cooking Products is a division. Complaint counsel argue that in reality Litton Systems is no more than a paper entity, that there is ". . . such complete control of the subsidiary by the parent that the subsidiary is a mere tool and its corporate identity a mere fiction." (CPFM at 47, quoting *Beneficial Corporation,* 86 F.T.C. 119 (1975), *aff'd in part and rev'd in part on other grounds,* 542 F.2d 611 (3rd Cir., 1976) *cert. denied,* 430 U.S. 983 (1977). Complaint counsel then offer an elaborate factual foundation for their contention: interlocking directorates; Litton Industries supervision and control over Litton Systems budget, officers, [50]management services, and product development; Litton Systems use of Litton Industries' name, reputation and goodwill; and Litton Industries actual participation in the practices here at issue (CPF 221–52).

The record shows that LMCP was largely an autonomous operation (George, Tr. 2011–21, 2048–51, 2062–75, 2078–84; Craver, Tr. 4305–06). However, Litton Industries does play an important, and direct, oversight role in connection with LMCP (George, Tr. 1942,

2020). Additionally, Litton Industries did provide legal advice in connection with the advertising at issue herein (George, Tr. 2051).

More important, however, is the corporate structure of respondents. LMCP is merely a division and has no corporate identity of its own (Finding 1, above). Therefore, the order herein must be directed to an actual legal entity—Litton Systems, Litton Industries, or both. Litton Systems is largely a paper entity (George, Tr. 1942–96). Although it may have been created for corporate organizational purposes and not for the purpose of evading responsibility for the actions of LMCP, or other divisions of Litton Systems, it has no obvious separate identity from Litton Industries.

Despite the fact that he was a vice-president of Litton Systems from 1973 until 1978 (George, Tr. 1942), William George was "not familiar with the business of Litton Systems" (Tr. 1943) or with the products marketed by it (Tr. 1977). He did not even know where the corporate headquarters of Litton Systems was located (Tr. 1956, 1993), despite the fact that during his nine and one-half years with Litton he visited the corporate headquarters of Litton Industries (which has the exact same address as the corporate headquarters of Litton Systems—Finding 1) approximately three times per year (Tr. 1994). Mr. George did not know how many employees Litton Systems had in 1976 and 1977 (Tr. 1993). Nor did he know how the officers of Litton Systems were chosen (Tr. 1995), or even how he was chosen as an officer of Litton Systems (Tr. 1996). All of this indicates that in actual practice LMCP was a division of Litton Industries and that Litton Systems was a mere paper corporation set up for corporate organizational purposes.

It is highly questionable under these circumstances whether an order herein can be effective without including Litton Industries. One of the basic legal principles involved in determining whether to include a parent corporation in a Commission order directed toward the operations of a subsidiary, is that liability of a parent corporation may be found where necessary to effectively enforce an order (See RPF 183). Due to the intercorporate relationships in this instance, such appears [51]to be the case here. Since LMCP is not a legal entity in and of itself, but merely a division of Litton Systems, the corporation, not the division must be covered by the order. However, for the purposes of this case Litton Systems is nothing more than a legal fiction; no matter what its justification for existence may be within the corporate structure of Litton Industries. Litton Systems is simply the alter-ego of Litton Industries with relationship to LMCP. Under the circumstances, failure to include Litton Industries could vitiate the order herein, if there were any change in the structure of

Litton Industries which would eliminate Litton Systems. Therefore, Litton Industries, Inc., should be included in the coverage of the order. *Beneficial Corporation et al.,* 86 F.T.C. 119, 158–162 (1975); *Zale Corp.* v. *Federal Trade Commission,* 473 F.2d 1317, 1322 (5th Cir., 1973); *P. F. Collier & Sons Corp.* v. *Federal Trade Commission,* 427 F.2d 261, 267 (6th Cir., 1970).

D. *Product Coverage*

Complaint counsel's proposed order would apply to "the advertising, offering for sale, sale or distribution of any commercial microwave oven, any consumer microwave oven, *or any other consumer product. . . .*" (emphasis added) (CPF, p. 95). Respondents allege on the other hand that the order, if any, should be limited to microwave ovens and microwave oven accessory products (RRB, p. 182).

It is respondents' position that an "all consumer products" order would not bear a reasonable relationship to the unlawful practice found in this matter (RPF 195–197). Further, they point out that microwave ovens and accessories for such ovens are the only products produced and sold by LMCP and that the latter organization is a largely autonomous division (RPF 183–189, 205). It is also argued that microwave ovens and the accessories thereto are one of the very few consumer products produced and/or sold by any subsidiary or division of Litton Industries and that the latter corporation is not oriented toward consumer products (RPF 205–206).

While the Commission has broad discretion in determining the type of order which should be entered in a particular case, it is well established that a cease and desist order must bear a reasonable relationship to the practices found to be violative of the Federal Trade Commission Act in each case. *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 394–95 (1965); *Jay Norris, Inc.* v. *Federal Trade Commission,* 598 F.2d 1244, 1249 (2d Cir., 1979); *Chrysler Corp.* v. *Federal Trade Commission,* 561 F.2d 357, 364 (D.C. Cir., 1977); *ITT Continental Baking Co.* v. *Federal Trade Commission,* 532 F.2d 207, 220–21 (2d Cir., 1976). [52]

The practices involved in this case related solely to microwave ovens and Litton has not been shown to have engaged in similar practices in connection with any other product (RPF 201). Microwave ovens and accessory products therefor are the only products manufactured or distributed by LMCP, the division directly involved in this proceeding (George, Tr. 1944). Moreover, the evidence reveals

that, considering all subsidiaries of Litton Industries, respondents are not heavily involved in, or oriented toward, the manufacture or distribution of consumer products (Craver, Tr. 4309–11).

Complaint counsel introduced in evidence Litton Industries product directories for 1977 (CX 164) and 1979 (CX 392). Such listings, in and of themselves, do not indicate that a particular product is a "consumer product;" one normally sold to the general public for their personal or household use.[32] Mr. Craver, an official of Litton Industries, described in detail the items on such lists and only a very few fit into the "consumer product category" (Craver, Tr. 4316–55, 4367–68, 4389–92; See also, RRB, pp. 212–13). None of the consumer products which were identified fell into the appliance category to which microwave ovens belong.

In short, complaint counsel have demonstrated no reason why the order herein should go beyond microwave ovens. Certainly, the fact that Litton is a large conglomerate which frequently buys and sells businesses and, thus, might at some time in the future acquire a company which sells consumer products (CPF 264), is not ground for a broader product coverage.

Therefore, I must find that the proper order coverage in this case, as far as product is concerned, is limited to microwave ovens. In this regard, I am mindful that LMCP also sells a line of accessories for its microwave cooking products, but these do not appear to be of a nature which would make them the subject of similar advertising practices (George, Tr. 1976, 1978–79; Craver, Tr. 4361–64, 4368–70). Consequently, it would make no sense to include them in the order. [53]

IX. RESPONDENTS' REQUESTS FOR OFFICIAL NOTICE

At page 170 of their reply brief, respondents' request that official notice be taken of a study of non-response in telephone surveys by two professors at Northeastern University, Professors Wiseman and McDonald. They contend that such study only came to their attention recently, since it was reported in *Marketing News* long after the close of the record herein. They allege further that such study is competent, reliable evidence of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. I disagree. In view of the fact that several experts, all with impressive qualifications, have testified to such opposite effect on this very topic in this case, as well as to the criteria

[32] I find Mr. Craver's definition of a "consumer product" (Tr. 4313–14) to be far more realistic than that of complaint counsel (See CPF 260). Office quality, commercial filing cabinets, for instance, are different from those normally sold for home use and should not be considered a "consumer product" (Craver, Tr. 4347–48).

to be applied in judging the efficacy of a survey or study, it can hardly be stated that still another study "cannot reasonably be questioned" as to accuracy. This simply is not the type of evidence of which I can take official notice. Furthermore, the entire point is mooted, since I ruled on the "bias of non-response" issue in respondents' favor in any event (Findings 77 through 80).

X. CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over the respondents.

2. The complaint herein states a cause of action and the proceeding is in the public interest.

3. The aforesaid acts and practices of the respondents as found in the foregoing Findings of Fact were and are to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale or distribution of microwave ovens (either for commercial or consumer use), in or affecting commerce, as [54]"commerce" is defined in the Federal Trade Commission Act, do cease and desist from representing, directly or by implication, that any commercial microwave oven or consumer microwave oven;

(a) is able to perform in any respect, or has any characteristic, feature, attribute, or benefit; or

(b) is superior in any respect to any or all competing products; or

(c) is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products,

unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination.

It is further ordered, That respondents, in connection with any future comparison advertising, wherein the attributes or quality of Litton microwave ovens are compared with those of other brands,

maintain accurate records, which may be inspected by Commission staff members upon reasonable notice, and:

(a) which contain documentation in support or contradiction of any such claim included in advertising or sales promotional material disseminated or caused to be disseminated by respondents, including all documentation prepared by or for survey organizations or advertising agencies employed by respondents (such documentation shall include written instructions for the supervisors and interviewers in connection with any future market surveys of service technicians or other persons which tend to show that Litton microwave ovens are superior in any way or preferred over any other brands);

(b) which provided or contradicted the basis upon which respondents relied at the time of the initial and each subsequent dissemination of the claim; and

(c) which shall be maintained by respondents for a period of three years from the date such advertising or sales promotional material was last disseminated by respondents or any subsidiary or division of respondents.

It is further ordered, That the respondents shall, within [55]sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

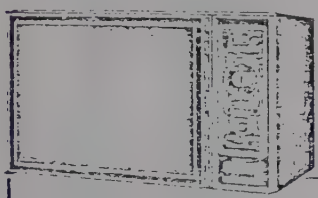
It is further ordered, That the respondents shall forthwith distribute a copy of this order to the Litton Microwave Cooking Products division.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor or any other change in the corporation which may affect compliance obligations arising out of this order.

Quality is No. 1 at Litton!

CX-1

76% of the independent microwave oven service technicians surveyed recommend Litton.



Litton Model 119 microwave oven.

Litton feeds all brands.

PREFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS SERVICING THOSE BRANDS

Brand To Brand	Litton vs. G.E.	Litton vs. Amana	Litton vs. Magic Chef	AVERAGE PREFERENCE FOR LITTON VS. ALL COMPETITIVE BRANDS (weighted average)
Which Microwave Oven Brand would you recommend to a friend?	59% vs 23%	56% vs 18%	81% vs. 1%	76% vs. 8%
Which Microwave Oven Brand is easiest to repair?	68% vs 5%	65% vs 8%	71% vs 0%	72% vs 4%
Which Microwave Oven Brand is the best quality?	48% vs. 16%	50% vs 25%	67% vs 1%	63% vs 9%
Which Microwave Oven Brand requires least repair?	38% vs 22%	42% vs 24%	51% vs 3%	53% vs 12%
Which Microwave Oven Brand do you have in your home?	48% vs. 19%	50% vs 18%	70% vs. 5%	67% vs. 10%

Among independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those surveyed said they would recommend Litton to a friend. And an average of 63% identified Litton brand ovens as having the best quality.

You'll find it in our full line of advanced countertop microwave ovens, double ovens and combination microwave ranges.

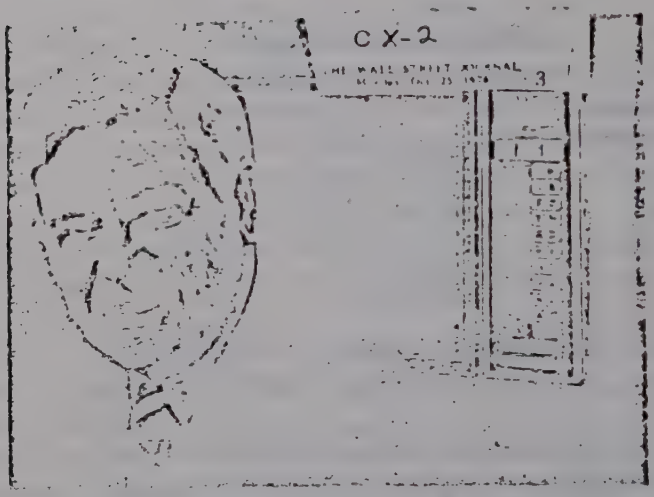
And in such Litton features as Vari-Cook® oven control, Vari-Temp® automatic temperature control and new Memory-matic® microwave program cooking. Innovative ways to microwave more foods better.

Need any more reasons to buy Litton? Ask your Litton dealer for a microwave cooking demonstration. For his name and information, call us right away, toll free 800-374-7777.

LITTON
Microwave Cooking

Litton...the right [illegible] Vari-Cook®.

345-554 O—82——5



Quality is No. 1 at Litton!

"76% of the independent microwave oven service technicians surveyed, recommend Litton."

Dan R. Cavalier, President
Marketing and Sales Division.

Among independent technicians surveying Litton and competitive microwave ovens, an average of 76% of those surveyed said they would recommend Litton to a friend. The Litton brand was an overwhelming preference over the competition.

We think you'll prefer Litton quality too.

You'll find it throughout our full line of advanced countertop microwave ovens, double-oven and combination microwave ranges.

And in such Litton features as Vari-Cook® oven control, Vari-Temp® automatic temperature control and new Microsymphonic™ microwave program cooking. Innovative ways to microwave more foods better.

You see, at Litton, quality is a lot more than our warranty. It's our assurance you're buying the best microwave cooking product available.

One that's been developed through high standards of cooking performance in our test kitchens, more useful cooking applications at a greater energy savings, and the highest level of quality, assurance, practical.

That's why Litton is the brand most recommended by people who know. Take their advice. For additional information, call us toll-free 800-328-7777.

*Conducted for Litton By Custom Research, Inc. 1976
Complete details available upon request.

PREFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS
SELECTING MORE BRANDS

Brand vs. Brand	Litton vs. G.E.	Litton vs. Amana	Litton vs. Magic Chef	Average Preference for Litton vs. all Competitors (weighted average)
Which Microwave Oven Brand would you recommend to a friend?	59% vs. 23%	66% vs. 18%	81% vs. 1%	76% vs. 8%
Which Microwave Oven Brand is easiest to repair?	68% vs. 5%	65% vs. 8%	71% vs. 0%	72% vs. 4%
Which Microwave Oven Brand is the best quality?	49% vs. 16%	50% vs. 26%	69% vs. 1%	63% vs. 9%
Which Microwave Oven Brand requires fewest repairs?	38% vs. 22%	42% vs. 24%	59% vs. 3%	53% vs. 12%
Which Microwave Oven Brand do you have in your home?	42% vs. 19%	59% vs. 18%	70% vs. 5%	67% vs. 10%

Respondents represent independent microwave oven service agencies who service at least two brands of microwave ovens. (one of them Litton) and do not represent a factory owned service agency.
Percentages add to less than 100% due to other responses (other brands and no preference)

LITTON
Microwave Cooking

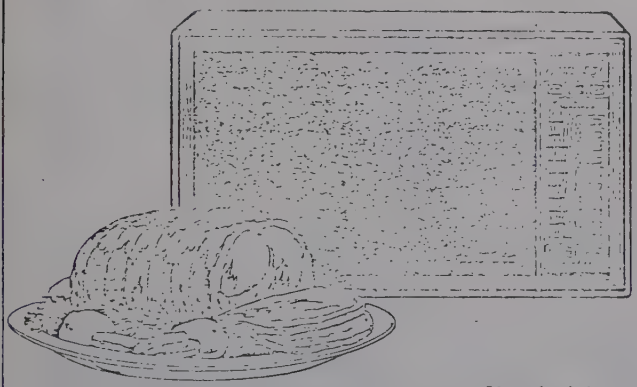
Litton... changing the way America Cooks.

© 1978 Litton Systems, Inc.

CX-3

Quality is No. 1 at Litton!

73% of the microwave oven service technicians surveyed* would recommend Litton.



Among technicians servicing Litton and competitive microwave ovens, 73% of those surveyed said they would recommend Litton to a friend. Survey respondents were 224 technicians who work for independent service agents authorized to service Litton microwave ovens, and who service at least one other microwave oven brand.

And 61% of those respondents identified Litton brand ovens as the best quality.

That's because at Litton, we consider our quality to be your assurance that you're buying the best microwave oven or range available.

You'll find that quality throughout our full line of advanced countertop microwave ovens, double-oven and combination microwave ranges. And in such Litton features as Ven-Cook® oven control, Ven-Temp® automatic temperature control, and Memorymatic® microwave program cooking. Innovative ways to microwave more foods better.

Need any more reasons to buy Litton? Ask for a Litton microwave cooking demonstration today!

Litton leads in survey.

PREFERENCE FOR SPECIFIC BRANDS AMONG TECHNICIANS SERVICING LITTON AND OTHER BRANDS.

Brand	Litton	Litton vs. Magic Chef	Litton vs. GE	PREFERENCE FOR LITTON VS. ALL OTHER BRANDS MENTIONED
[illegible]				
[illegible]	66	81	59	73
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	65	71	64	67
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	50	69	48	61
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	42	59	38	51
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	59	70	48	69
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[illegible]

LITTON
Microwave Cooking

Litton... changing the way America Cooks.

© 1977 Litton Systems, Inc.

APPENDIX C

Litton is the best commercial microwave oven buy.

[illegible]% of the independent microwave oven service technicians surveyed recommend Litton to their customers.

When technicians servicing Litton and competitive brands were asked in an independent survey* which microwave oven they recommend to prospective customers, 86% said "Litton." An overwhelming preference over major competitive brands like Amana and Sharp.

These experienced servicemen prefer Litton over other brands for many reasons.

That's what we've been saying all along.

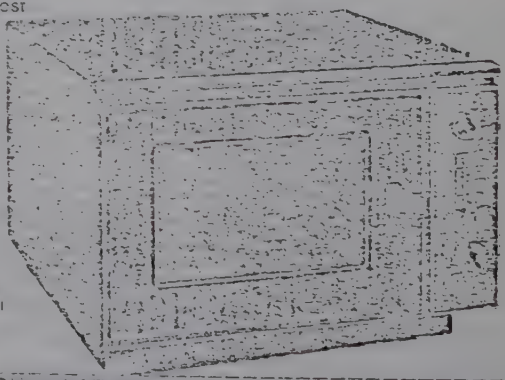
Litton offers a full line of the most advanced microwave oven systems. From 600 to 2000 watts. With such innovative features as new Vari-Power™ control. Push-button solid state timers. Automatic defrost. Intrusion-proof doors. Advanced choke and seal plate design. Dual-concealed interlocks for added safety. And dependable Licron® Advanced Power Supply system.

And each oven comes with the total support of the Litton Systems Masters: Engineers, Food Applications Chefs, Sales and Service representatives who can help increase profits and maximize efficiency.

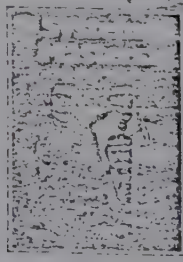
Take the advice of your independent microwave serviceman. Litton is the best commercial microwave oven you can buy.

	Litton vs All** Brands Combined	Litton vs Amana	Litton vs Sharp
[illegible] quality	76% vs 14%	77% vs 12%	82% vs 6%
Easiest to repair on location	77% vs 9%	77% vs 8%	83% vs 4%
Requires fewest repairs	75% vs 14%	70% vs 9%	70% vs 11%
Least costly to maintain in operation over time	69% vs 20%	65% vs 15%	65% vs 12%

[illegible] recall



Litton... changing the way America Cooks.



Call 800-328-2277 toll free FCCC 11-4
Or write Litton Microwave Cooking Products, 1405 Xenium Lane No., Minneapolis, MN 55440
Tell me more about what makes Litton a better microwave oven buy.
☐ Have a Litton representative call
Name _____
Title _____
Firm _____
Business Address _____
City _____ State _____ Zip _____
Telephone _____
Area Code _____
© 1976 Litton Systems, Inc.

LITTON
Microwave Cooking

APPENDIX D

79% of microwave service technicians surveyed say Litton is the best quality commercial microwave oven.

CX-6

80% would recommend Litton to their customers.

A recent survey of independent service technicians ranking Litton and other leading commercial microwave ovens on behalf of the survey sponsor, they would recommend Litton to their respective customers. A strong preference over other competitive brands, including the survey such as Amana and Sharp. Survey respondents were 211 technicians who work for independent service agencies authorized to service Litton commercial microwave ovens and who service at least one other brand.

These experienced technicians obviously prefer Litton over other brands for many reasons. And Litton quality is certainly one of them.

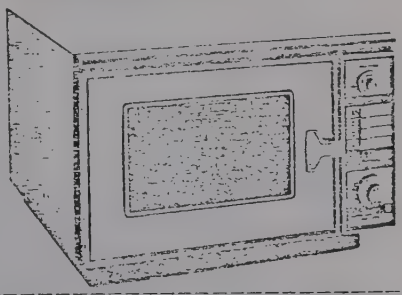
Litton offers a full line of the most advanced microwave oven systems. From 500 to 2500 watts. With such important features as new Variable-Power® control. Distribution of stable timers. Automatic defrost. Intrusion-proof front. Advanced oven and sea plate design. Quiet cooling fan. Interlocks for added safety. And dependable Litton® Advance Power Supply System.

And each oven comes with the total support of the Litton System: Masters, Engineers, Food Applications, Chefs, Sales and service representatives with partnership to increase profits and many other benefits.

Following the preference expressed by the microwave service technicians surveyed, 79% of whom said Litton is the best quality commercial microwave oven.

Which is Best	Percentage of Survey Respondents Ranking Technicians Surveying Litton and Other Brands**		Percentage for Litton vs. All Other Brands Combined
	Litton vs. Amana	Litton vs. Sharp	
Which brand of commercial microwave oven has the best quality?	77% vs. 12%	82% vs. 6%	79% vs. 14%
Which brand of commercial microwave oven is the easiest to repair on location?	77% vs. 6%	83% vs. 4%	77% vs. 9%
Which brand of commercial microwave oven requires fewest repairs?	70% vs. 9%	70% vs. 11%	75% vs. 14%
Which brand of commercial microwave oven is least costly to own in the long run?	65% vs. 15%	65% vs. 7%	59% vs. 20%
Which brand would you recommend to a prospective customer?	73% vs. 14%	80% vs. 7%	80% vs. 16%

**Survey conducted by Gallup Research, Inc., Minneapolis, MN. Additional data from the survey may be available on written request.



Litton... changing the way America Cooks.

Call 800-328-7[illegible] (in Minnesota call 612-553-2354). Or write Litton Microwave Cooking Products, 8201 Science Center Drive, Minneapolis, MN 55440.

Tell me more about what makes Litton a better microwave oven buy.

☐ Have a Litton representative call.

NRN 8-7

Name _____

Title _____

Firm _____

Business Address _____

City _____ State _____ Zip _____

Telephone _____

Area Code _____

LITTON Microwave Cooking

©1977 Litton Systems, Inc.

77-15182 Print ed in U.S.A.

APPENDIX E

CX-14

Quality is not at Litton!

76% of the independent microwave oven service technicians surveyed* recommend Litton.

Other advanced features from Litton

ROASTS COME OUT BROWN

Litton leads the trade

LITTON

Litton . . . changing the way America Cooks.

ASK FOR A DEMONSTRATION

SOUTH BEND

PORTAGE

FULTON

PLYMOUTH

NEW CARLISLE

MICHIGAN CITY

VALPARAISO

WAKARUSA

WARSAW

WINAMAC

FULTON

CULVER

PLYMOUTH

ELKHART

MISHAWAKA

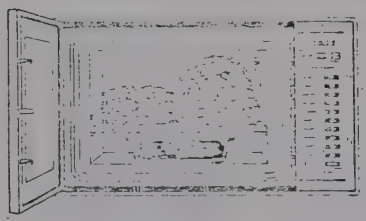
MARION

DOWNTOWN

CX-49

It's here from Litton!

The greatest cooking breakthrough since microwave.



Litton Meal-In-One microwave.

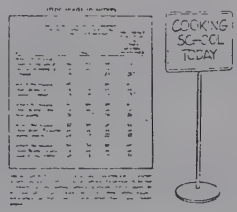
Quality is No. 1 at Litton!

73% of the trade microwave oven service technicians surveyed would recommend Litton.

Attend Our Next Cooking School

Tuesday Night, Oct. 25th

Call [illegible] and Make Your Reservation Now.



LITTON

Litton... changing the way America Cooks.

Come see the best new cooking idea since microwave.

• FINANCING AVAILABLE • DELIVERY OPTIONAL

Call Heating

STORE HOURS
Monday-Friday 9-5
Saturday 9-12 noon

THE PORTRAIT TERRIBLE — No. 12

CX- 39

DIX H

e 2 — Wednesday, Dec. 8, 1976 Sta[illegible] Fairmont, Minn

Quality is No. 1 at Litton!

76% of the independent microwave oven service technicians surveyed recommend Litton.

Litton leads all brands.

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[illegible] And in turn Litton features as Van-Cook® oven control, Van-Timer® automatic temperature control, the new Memo-Matic® [illegible] program [illegible] more foods better.

There are more reasons to buy Litton. Ask about Litton [illegible] showing [illegible] soon.

LITTON

Litton... changing the way America Cooks.

FREE Turkey, Cookbook and Browner with every oven purchased thru December 24th

* * OPEN EVERY NIGHT TILL 9:00 * *
Saturday 9:30-5:30 Sunday 1:00-5:00
* Till Christmas *

WE FEATURE: Litton Microwave Ovens-Ranges-Accessories

WE OFFER - Delivery & Installation
- Free Cooking Classes Every Sat. 11 a.m. - 3 p.m. til Christmas

Call For An In Home Demonstration

So. Minn. Microwave and Appl. Inc.
411 So. State St. - Next to Duling Optical
Fairmont, Mn. Phone 235-4241

CX-126

CONTINUITY

KAMO

ROGERS, ARKANSAS

Advertiser: LINKWAY

Address: ROGERS

Begin: End:

Prepared by: CR:sf

(MUSIC INTRO.)

ARE YOU STILL SKEPTICAL ABOUT BUYING A MICROWAVE OVEN? OR MAYBE YOU'RE JUST UNCONVINCED ABOUT WHICH BRAND TO BUY? WELL, WHEN IT COMES TO MICROWAVE OVENS, ONE NAME IS LEADING ALL THE REST. THAT'S RIGHT! IT'S LITTON. 73% OF THE TECHNICIANS WHO SERVICE MICROWAVE OVENS RECOMMEND LITTON OVENS OVER ALL OTHER MICROWAVE OVENS. IT'S NOT HARD TO GUESS WHY, BECAUSE QUALITY IS #1 AT LITTON, AND AT LINKWAY AT 8TH AND WALNUT IN ROGERS...I'M LHISA BROWN, COME IN AND LET ME SHOW YOU THE NEW LITTON LINE, WITH GREAT FEATURES LIKE MEMORYMATIC, VARICOOK, AND VARI-TEMP, AND AUTOMATIC TEMPERATURE SENSING. DO YOU REALLY NEED ANY MORE REASONS TO BUY A LITTON?

8 X 4 0 3

APPENDIX J

CX-54

CONTINUITY OKFAY

SPONSOR: LINKWAY WRITER

PROGRAM: TIME 30 sec.

COPY STARTS: 2-1-78 STOPS: 2-12-78 DATE

OTHER INSTRUCTIONS:

LITTON

ARE YOU STILL SKEPTICAL ABOUT BUYING A MICROWAVE OVEN? OR MAYBE YOU'RE JUST UNCONVINCED ABOUT WHICH BRAND TO BUY? WELL, WHEN IT COMES TO MICROWAVE OVENS, ONE NAME IS LEADING ALL THE REST. THAT'S RIGHT! IT'S LITTON! 73 PERCENT OF THE TECHNICIANS WHO SERVICE MICROWAVE OVENS RECOMMEND LITTON OVENS OVER ALL OTHER MICROWAVE OVENS. IT'S NOT HARD TO GUESS WHY, BECAUSE QUALITY IS NUMBER ONE AT LITTON, AND AT LINKWAY, 1535 N. COLLEGE IN FAYETTEVILLE. COME IN AND LET US SHOW YOU THE FULL LITTON LINE. ALL AT LINKWAY, YOUR FULL SERVICE LITTON STORE.

LINKWAY HAS LINKED UP WITH LITTON! LITTON, THE ULTIMATE IN MICROWAVES. LIKE THE LITTON COMBINATION MICROWAVE RANGE. IT WORKS LIKE A CONVENTIONAL OVEN AND A MICROWAVE, ALL IN ONE! WITH A BEAUTIFUL SMOOTH TOP COOKING SURFACE. ROAST A MOIST TURKEY IN JUST ONE HOUR. COOK A WHOLE MEAL IN JUST A FRACTION OF THE USUAL TIME. EVEN COOK WITH METAL, AND IT'S SELF-CLEANING. COME IN AND SEE US AT LINKWAY, 1535 N. COLLEGE IN FAYETTEVILLE, AND DISCOVER THE ULTIMATE IN COOKING FROM LITTON!

MAR 21 1978

FEDERAL TRADE COMMISSION
Docket No. 9123 Consolidation
Exhibit No. 54
Date Identified
Date Received 9/17/79
Date Rejected
In the matter of LITTON INDUSTRIES
Witness
Reporter Dinkel
By RJM

Opinion of the Commission

By Dixon, *Commissioner*

The principal question in this case, as it reaches the Commission, is what form of order should issue to prevent recurrence of deceptive advertising in which respondents have engaged. The complaint was issued on February 1, 1979, and charged Litton Industries, Inc. with violating Section 5 of the FTC Act, 15 U.S.C. 45, by disseminating misleading advertisements for microwave cooking ovens produced by Litton Microwave Cooking Products Division. (LMCP)[1]

The essence of the charge against respondents was that they and their dealers had published advertisements stating that independent microwave oven service technicians preferred Litton ovens in various respects. These preferences were said to be demonstrated by surveys conducted to determine the opinions of such independent technicians. The complaint [2]alleged, however, that the advertisements were deceptive because the underlying surveys provided no "reasonable basis" for the claims based upon them.

Trial of the case was held before administrative law judge (ALJ) John J. Mathias, who concluded that Litton's surveys were defective in several respects, and could not support the claims that were based on them. The ALJ recommended entry of an order that would prohibit respondents from representing without a reasonable basis (1) the performance or other characteristics of microwave ovens; (2) the superiority of microwave ovens; and (3) that Litton microwave ovens are recommended, used, chosen, or otherwise preferred in any respect more often than competing brands. (I.D. p. 54)[2]

Respondents have not appealed from the initial decision, but complaint counsel have, arguing basically that (1) ALJ Mathias identified only some of the inadequacies in Litton's surveys; (2) the order should include paragraphs addressing the specific deceptive practices challenged in this case—misuse of survey results or use of inadequate surveys and (3) whatever order is entered should apply to all "consumer products" and not only "microwave ovens" as

[1] The complaint was amended on April 16, 1979 to name Litton Systems, Inc. (a wholly owned subsidiary of Litton Industries, Inc.) as co-respondent. Litton Microwave Cooking Products Division was, during the time covered by the complaint, a direct division of Litton Systems, Inc. rather than Litton Industries, Inc.

[2] The following abbreviations are used in this opinion:

I.D. – Initial Decision, Finding No.
I.D. p. – Initial Decision, Page No.
CX – Complaint Counsel's Exhibit No.
RX – Respondent's Exhibit No.
Tr. – Transcript of Testimony, Page No.
CB – Complaint Counsel's Appeal Brief before the Commission
RB – Respondent's Answer Brief before the Commission

proposed by Judge Mathias. Our review of each of these assignments of error follows.

(I) BACKGROUND

In 1976, two surveys were conducted for LMCP by Custom Research, Inc., a market research firm, to determine which brand of microwave oven was preferred by certain independent microwave oven service agencies. (I.D. 38) The first survey was aimed at agencies servicing microwave ovens used for commercial purposes, and the second at agencies that serviced microwave ovens used by consumers in their homes. (I.D. 39–40)

The survey results were originally intended only for internal use, but because of their highly favorable results they were made the centerpiece of two ad campaigns. (I.D. 41) The first campaign, run from October, 1976 through February, 1977, was consumer-oriented, and consisted of advertisements placed in national periodicals and metropolitan daily newspapers. [3](I.D. 8) The second campaign comprised six advertisements run in trade journals between August and October, 1977. (I.D. 10) Litton also sent copies of its advertisements to Litton dealers, which they, in turn, placed in local newspapers or caused to be aired on radio. At least 109 of these dealer-placed ads were run between 1976 and 1978, some paid for in part by Litton. (I.D. 10)

A typical advertisement for consumer microwave ovens began with the headline: "Quality is No. 1 at Litton." The sub-head states "76% of the independent microwave oven service technicians surveyed*[3] recommend Litton." In the body of the advertisement, under a caption claiming that "Litton leads all brands" appears a chart in which Litton is ranked against G.E., Amana, Magic Chef, and then all competitors combined, on each of five criteria. In all 20 comparisons Litton comes out ahead. The text of the ad highlights two of the survey findings:

> Among independent technicians servicing Litton and competitive microwave ovens, an average of 76% of those surveyed said they would recommend Litton to a friend. And an average of 63% identified Litton brand ovens as having the best quality. CX-1

The ALJ concluded that the foregoing advertisement and others like it represented that the majority of independent microwave oven service technicians servicing Litton and competitive microwave ovens (1) would recommend Litton to a friend; (2) believe that Litton microwave ovens are the easiest to repair of all microwave oven

[3] The footnote stated "Survey conducted by Custom Research, Inc. Complete survey results available on request."

brands; (3) believe that Litton microwave ovens are superior in quality to all other microwave oven brands; (4) believe that Litton microwave ovens require the fewest repairs of any oven brand; and (5) have Litton microwave ovens in their homes. (I.D. 21) The Litton advertisements also represented that support for the foregoing five claims could be found in the survey conducted by Custom Research, Inc. and that this survey constituted a reasonable basis for the claims made. (I.D. 21, 34)[4] Similar findings were made by Judge Mathias regarding the representations contained in advertisements for Litton commercial ovens. (I.D. 29, 34) [4]

(II) DEFECTS IN LITTON SURVEYS

The ALJ found the Litton surveys wanting in several substantial respects that made them unsuitable support for the advertisements that were based upon them. (I.D. 38–74) These findings have not been appealed by respondents, and our own review yields no reason to disturb them.

The challenged advertisements represented that a survey had been made of the opinions of independent microwave oven service technicians who had serviced Litton and one other brand of microwave oven.[5] In fact, however, survey respondents were drawn only from a list of "Litton-authorized microwave oven service agencies." The ALJ found that there were at least 100 agencies that serviced both Litton and competing products but that were not designated as "Litton-authorized" service agencies. (I.D. 59) Many of these agencies were authorized by competing manufacturers.

Complaint counsel contend that there were far more than 100 such agencies (CB 11ff.), but Judge Mathias found complaint counsel's evidence insufficient to warrant any estimate beyond 100. We do not find it necessary on this appeal to determine whether complaint counsel are correct in their objection to Judge Mathias' finding. Their evidence does suggest that there were more agencies disre-

[4] The ALJ also found that these ads represented implicitly that Litton microwave ovens are superior in quality to all other microwave oven brands, and are the easiest to repair and require the fewest repairs of all microwave oven brands. (I.D. 23–25)

[5] Complaint counsel argue that Litton's ads could reasonably have been read to represent that *all* independent service technicians (not just those who had serviced Litton and one other brand) had been surveyed, because the "Litton and one other brand" qualification was stated in very fine print far removed from the reference to service technicians (and in a few ads not at all). We agree that fine print qualifications are often not sufficient to eliminate the deceptive potential of large print headlines. In this case, however, we believe that the use of a fine print qualification was reasonable. To begin with, many consumers would not be deceived by the bold print headline, because they would assume that only the views of technicians having experience with Litton and competing brands would be solicited. Beyond that, if some consumers were to assume that Litton had surveyed all technicians, it is not clear that this false assumption would necessarily prove material to their assessment of the ads. Under these circumstances, deception, if any, was minimal, and fine print was a reasonable medium for disclosing a qualification of only limited relevance. By contrast, compare fn. 6 *infra*.

garded by Litton than the 100 estimated by ALJ Mathias, but it is difficult to determine from this evidence how many more agencies might have been involved. [5]

What is clear, whether one accepts Judge Mathias' estimate or complaint counsel's, is that it was misleading for Litton to take an attempted census of the opinions of "Litton-authorized" service agencies and pass it off as being a survey of the opinion of *all* service technicians. Litton should have endeavored to include within its attempted census *all* service agencies (including those authorized by its competitors) that serviced Litton and a competitor. Alternatively, if Litton found it too difficult or expensive to take a census or a representative sample of all service agencies that serviced Litton and another brand, Litton should have made clear in its advertisements that it had surveyed only "Litton-authorized" entities. Such a disclosure would at once have eliminated any misrepresentation of the survey population, while permitting consumers to draw their own conclusions about the proper weight to be accorded the survey findings.[6]

A second significant deficiency in the Litton surveys was that the list from which survey respondents were drawn included at least 52 agencies (I.D. 52), and quite probably a great many more (I.D. 53–56), that sold as well as serviced microwave oven products. As Litton's own witnesses recognized, the inclusion of such agencies in any survey could bias the results significantly, because servicing dealers tend to prefer the brand that they sell. (I.D. 57) In recognition of this fact, Litton's surveys were intended to exclude servicing dealers, but failed of their purpose because of the way in which respondents were selected.[7] [6]

A third defect in the Litton surveys found by the ALJ was that they measured the opinion of only one technician from each service agency. The ALJ determined that this did not provide a reasonable basis for advertising claims that a "survey of technicians" had been taken. The term "survey" is likely to imply projectibility to the

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[6] After being contacted by FTC staff, Litton began to disclose in very fine print the fact that its surveys included only "Litton-authorized" agencies. We do not believe that such fine print disclosures were adequate to remedy the significantly deceptive characterization of the survey population contained in the headline. *Giant Food, Inc.* 61 F.T.C. 326, 344–46, 348–49 (1962), *aff'd*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964); *Standard Oil Co. of California*, 84 F.T.C. 1401, 1470–71 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978).

[7] Complaint counsel allege as a further defect in the surveys (not found by Judge Mathias), that they did not measure the views of all servicing dealers not owned by a microwave oven manufacturer. We agree that the term "independent microwave oven service agency" might reasonably be construed by some consumers to mean an agency that is not owned or controlled by an oven manufacturer, even if the agency happens to sell, as well as service, some brand(s) of microwave oven. It is not clear to us, however, that this alleged misrepresentation would necessarily be material. To be sure, the surveys should either have excluded all servicing dealers, or included all servicing dealers not owned by a manufacturer, but had the former been accomplished, we cannot find on this record that there would be any reason to quarrel with the surveys' definition of an independent microwave oven service agency.

entire population sampled. According to the ALJ, inasmuch as some service agencies employed 10 or 11 technicians, whose opinions frequently differed, a sample of only one technician per agency was insufficient to justify representations about any universe of independent service technicians (I.D. 66–67)[8] Of greater significance, the ALJ also found that the surveys failed to establish that those technicians who did respond had sufficient expertise with Litton and competing brands to make any judgment about them. Verbatim comments from many of those interviewed indicated that they disavowed having sufficient experience to make any sort of informed judgment, but their tentative statements of preference were nevertheless counted along with those of technicians who were qualified to give judgment. (I.D. 69–72)

(III) ORDER PROVISIONS

A. *General Observations*

Complaint counsel have objected both to the substantive provisions of the order and to the limited product coverage. Respondents argue, generally, that no broader order than that [7]entered by the ALJ is warranted by the record. Respondents contend that the violations found by the ALJ are insubstantial, and that the lack of expert agreement about the proper way to conduct survey research precludes entry of the order recommended by complaint counsel.[9] In respondents' view, entry of such an order might chill the use of survey research for advertising purposes.

The Commission is sensitive to respondents' concern that advertisers not be unreasonably restrained in their use of survey research in advertising. There is plainly much potential for improving the information value of advertising through the use of survey research, and this is certainly to be encouraged. On the other hand, references in advertisements to "surveys", "tests", and the like also have considerable potential to mislead. The existence of a "survey" as support for a claim of product superiority may well imply to many

[8] In light of the unrebutted observations made by respondents at RB 39n.40, we find the ALJ's reasoning on this point somewhat thin. Selection of only one technician per agency may have been insufficient to qualify Litton's survey as a reliable census of service agencies, for the reasons noted by ALJ Mathias, but this does not necessarily demonstrate that the choice of technicians was insufficient to qualify as a random sample of all technicians, for the reasons noted by respondents at RB 39n.40. Given the other deficiencies in the Litton surveys noted herein, however, a resolution of this point is not necessary to our disposition of the appeal.

[9] Respondents have not appealed from the order recommended by the ALJ, although they suggest in their Answer Brief to Complaint Counsel's appeal that only a "narrowed" version of the ALJ's recommended order is appropriate (RB 54) We believe that the ALJ's recommended order, so far as it goes, is appropriate. We do note, that as with any substantiation order, the claims covered are only those that would be capable of objective verification, and the type of substantiation required is only such as is appropriate to the type of claim being made. *See Fedders Corp.* v. *FTC*, 529 F.2d 1398, 1403–04, (2d. Cir.), *cert. denied* 429 U.S. 818 (1976).

consumers a measure of precision and accuracy that they would be less willing to attribute to the same claim made without reference to any statistical support. We assume this is why advertisers wish to use surveys; it is also, however, a reason why those surveys must be suitable to demonstrate whatever they are used to show.

Witnesses for both sides appear to agree that the quality of survey research used for marketing purposes leaves much to be desired (*e.g.*, Tr. 4166), at least when judged by the standards of an expert. Most of this research, however, does not become the basis for advertising claims directed at consumers. When used for internal consumption by marketing personnel, such research may serve its intended purpose quite well, because those individuals making use of it are equipped by training, experience, and proximity to assess for themselves the quality of the research and to act with awareness of any defects in it.

A consumer reading a brief summary of a survey in an advertisement, by contrast, is not as well situated to assess its insufficiencies. For this reason, as ALJ Mathias recognized (I.D. 73), surveys that are used as the basis for advertising claims must be held to higher standards than may prevail among surveys [8]intended only for internal corporate use. The surveys used by Litton in this case were deficient in several significant respects enumerated by the ALJ. We do not believe that these can be regarded as trivial, or defended by reference to the poor quality of other research that is not made the basis of advertising claims. On the other hand, the Commission does recognize that a proper balance must be struck in this area, because standards that are too stringent may discourage the use of surveys that convey to consumers a basically accurate message. With the foregoing considerations in mind, we shall assess the specific changes proposed by complaint counsel in the ALJ's recommended order.

B. *Practices Covered*

The principal operative order paragraph recommended by the ALJ would forbid Litton to represent that any commercial or consumer microwave oven

(a) is able to perform in any respect, or has any characteristic, feature, attribute, or benefit; or

(b) is superior in any respect to any or all competing products; or

(c) is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products

unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination.

Respondents have not objected to this paragraph. Complaint counsel argue that its scope should be expanded to apply to all "consumer products" manufactured by Litton (a point to be discussed *infra.*) and that the term "reasonable basis" should be defined in the order to mean "competent and reliable surveys, tests, or other evidence which substantiates the representation", with "competent and reliable" in turn defined.

A formulation nearly identical to that recommended by complaint counsel was recently applied by the Commission in *Sears, Roebuck & Co.,* Docket No. 9104 (1980), *appeal pending,* No. 80-7368 (9th Cir.) although it was there not subject to dispute by the respondent. It does not appear to us from [9]respondents' brief that they dispute that "competent and reliable" is a proper characterization for the type of substantiating material that an advertiser should possess before making a claim. (RB 29) Indeed, it is hard to see how evidence of any description could constitute adequate substantiation for a claim were it not competent and reliable. Respondents argue that these terms are subject to a variety of possible interpretations depending upon the type of substantiating evidence on which the advertiser chooses to rely. This point is certainly well taken. However, absolute precision in this area is not possible, and we note that respondents themselves have not objected to the ALJ's proposed order, which requires only a "reasonable basis" and is, therefore, even less precise than the order that complaint counsel would impose.

The same observations are applicable to complaint counsel's proposal to define a "competent and reliable survey or test" as

> one in which persons with skill and expert knowledge, in the field of survey research or testing, conduct the survey or test and evaluate its results in an objective manner, using procedures that insure accurate and reliable results.

There may be room for doubt about the application of this standard in particular cases, but it adds at least some measure of specificity to the ALJ's order.

Respondents object further to the above-quoted provision that it may set too high a standard for survey research by requiring that it be conducted by "experts". In respondents' view, if the order is read in light of the facts of this case, it would appear implicitly to condemn as insufficiently expert those personnel who conducted the Litton surveys. Such a standard, in turn, would make the execution of survey research for use in advertising more difficult and expensive. (RB 30)

We share fully respondents' concern, but we cannot accept their

premise as to the meaning or effect of complaint counsel's proposed order. The proposed order language is designed merely to give greater specificity to the term "reasonable basis", and not to cast doubt upon the qualifications of those who conducted the Litton surveys in this case. To eliminate any room for doubt on this score, however, we shall amend the term "persons with skill and expert knowledge in the field of survey research or testing" to read "persons qualified to do so." This change reflects the fact that the degree of experience and [10]expertise required of those who design and conduct a survey or test must inevitably depend upon the circumstances and the nature of the survey or test itself. Certain expertly designed surveys can obviously be conducted by lay personnel, with no survey expertise. In such a case, those lay personnel would be "qualified" to conduct the survey. Indeed, it is possible that some types of surveys might be so simple that relatively little or no specialized training would be necessary even to design them. Most often, however, surveys or tests, to be competent and reliable, will require at least some expert input at the design stage. The order entered herein is intended to reflect that general point, without discouraging in any way the proper use of survey-based advertising. (Paragraph I(1) of Commission's Final Order).

Paragraphs 2 through 5 in complaint counsel's proposed order are designed to address the specific abuses in this case—misuse of survey results. In a sense they provide a gloss on the meaning of "reasonable basis" in paragraph 1 as it relates to tests or surveys. Our review of these proposed order paragraphs follows.

Complaint counsel's proposed paragraph 5 would prohibit respondents from

> Misrepresenting in any manner, directly or by implication, the purpose, sample, content, validity, reliability, results or conclusions of any survey and/or test.

Respondents' expert, Dr. Wilkie, endorsed the general concept of a prohibition on misrepresentations of survey or test results as a remedy for any violations that might be found (Tr. 3883, 3885ff.) and argued that it would obviate the need for certain other paragraphs proposed by complaint counsel. We agree that this paragraph is central to the violations found by the ALJ in this case, and should be adopted.[10] We have deleted the word "validity" as unnecessary. (Paragraph II(1) of Commission's Final Order). [11]

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[10] Respondents cite in opposition to this paragraph *Chrysler Corp.* v. *FTC*, 561 F.2d 357 (D.C. Cir. 1977), wherein a prohibition on "misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test, report, study, research, demonstration or analysis" was struck down. 561 F.2d at 364. The court in *Chrysler*, however, did sustain a prohibition on false or deceptive representations of test results with respect to fuel economy. 561 F.2d at 364. The *Chrysler* court was concerned with the potentially limitless scope of

(Continued)

Paragraphs 2, 3, and 4 proposed by complaint counsel are in large part elaborations on proposed paragraph 5. We believe that proposed paragraphs 2 and 3 provide useful elaboration and should be adopted, but that proposed paragraph 4 should be rejected.

Paragraph 2 proposed by complaint counsel would forbid respondents from

> Advertising the results of a survey unless the respondents in such survey are a census or a representative sample of the population referred to in the advertisement, directly or by implication. A representative sample need not be a probability sample so long as when the ad is first disseminated respondents have a reasonable basis to expect the sampling method used would not produce biased results.

This paragraph is tailored to the deceptive practices found in this case, and we shall adopt it. There can be no argument with the proposition that if an advertisement claims, directly or by implication, that the views of a given population have been surveyed, the survey should have elicited either the views of every member of the population (as in a census), or else the views of a representative sample of the population.[11] A survey that did not take either a census or a representative sample of a given population could not be used to represent the views of that population. This was the fault of the Litton surveys. They were advertised as demonstrating the views of all independent microwave oven service technicians who had serviced Litton and at least one other brand. In fact, however, as the ALJ found, the surveys were neither censuses (as intended), nor representative samples from which Litton could reasonably project the views of the entire population described in its advertisements. Litton could have cured the defect by use of a representative sample, or by accurately and conspicuously disclosing the identity of the population that was actually surveyed. [12]

Litton's principal objection to complaint counsel's paragraph 2 appears to be that Litton construes "representative sample" in the first sentence to mean "probability sample" in the strict statistical sense.[12] The necessity to conduct a "probability sample", it argues,

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the stricken order provision in light of what it characterized as a "somewhat thin" Commission case on the merits. In this case, the proposed order provision is considerably narrower than the provision deleted in *Chrysler*, both because it is limited to "tests or surveys" and because it is limited to products comprising a tiny fraction of Litton's sales, while the order in *Chrysler*, was applicable to the company's entire production.

[11] A representative sample of a population is a sample that "has been selected in a manner which permits projection of results from the sample to the universe from which it is drawn." Tr. 4254; *see also* Tr. 3882. An attempt to perform a census which fails because some fraction of the census population cannot be contacted, may nevertheless yield a representative sample so long as there is reason to believe that those members of the population actually surveyed are representative of the entire population. In this sense it is not fruitful to quarrel over whether Litton succeeded in conducting a "census" or merely took a sample. In either case the relevant question for the consuming public is whether the results of the survey are projectible to the entire population whose views the survey is represented as reflecting.

[12] Litton also objects to the term "by implication" in the proposed order, fearing liability where it unwittingly misrepresents, by implication, that a survey accurately reflects the views of some population. It is well-established

(Continued)

imposes too great a burden on research-based advertising. To meet this objection of Litton and its expert witness Dr. Wilkie (Tr. 3735), complaint counsel have offered the second sentence of their proposed paragraph 2, making clear that a representative sample need not be a probability sample, so long as Litton has a reasonable basis to suppose that whatever sample it does select will not yield biased results. This would permit Litton to employ, for example, a properly selected "judgment sample" or "convenience sample." (Tr. 4166) Similarly, if Litton wished to attempt a census, but failed to contact all members of the surveyed population, it might still treat the results as a representative sample so long as it had a reasonable basis to suppose that those population members not responding to the survey would not bias its results by virtue of their non-response.

To an extent we agree with Dr. Wilkie, respondents' expert, that proposed paragraph 2 overlaps with proposed paragraph 5. In essence, to represent the characteristics of a given population based upon a survey of an unrepresentative sample amounts to a misrepresentation of the "purpose" or "results" or "conclusions" of the survey, because the survey cannot properly be used to conclude anything about a population of which its sample is not representative. We shall include proposed paragraph 2 in our order, however (along with proposed paragraph 5) because it defines with specificity one particular practice that inevitably leads to the misrepresentation of survey results. (Paragraph II(1) of Commission's Final Order). [13]

Complaint counsel's proposed paragraph 3 requires that respondents not represent that

> experts were surveyed unless reasonable care was taken to insure that the survey respondents possessed sufficient expertise to qualify as respondents for the survey and to answer the survey questions. For purposes of this order, an 'expert' is an individual, group or institution held out as possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

While this paragraph, too, might be subsumed within the general prohibition on misrepresentation of survey results, it too describes with specificity one of the violations that occurred in this case, and we shall incorporate it in the order. ALJ Mathias found that many of

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principle of advertising law, however, and critical to any attempt to prevent deceptive advertising, that advertisers be held responsible for implied, as well as express, misrepresentations in their advertisements. "Deception may result from the use of statements not technically false or which may be literally true." *United States* v. 95 *Barrels of Vinegar*, 265 U.S. 438, 443 (1943). "The important criterion is the net impression which the advertisement is likely to make upon the general populace." *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 679–80 (2d Cir. 1944).

the technicians surveyed by Litton were unqualified to offer an expert view on the comparative merits of Litton and its competitors because they lacked experience with one or the other of the brands they were being asked to compare. (I.D. 69–72) It was plainly misleading to tabulate their opinions and pass them off as those of technicians familiar with competing brands, and proposed paragraph 3 is warranted to prevent similar occurrences. (Paragraph II(3) of Commission's Final Order).

Proposed paragraph 4 would prohibit advertising references to surveys or tests unless

(a) such survey and/or test is designed, executed and analyzed in a competent and reliable manner; and

(b) the survey and/or test results are accurately reflected in the advertisement; and

(c) the survey and/or test supports or proves the claim represented in the advertisement.

Proposed paragraph 4(a) is largely subsumed by modified paragraph 1, and is, therefore unnecessary. Proposed paragraph 4(b) adds nothing to proposed paragraph 5, and the useful content of proposed paragraph 4(c) is similarly captured by proposed paragraph 5. Therefore proposed order paragraph 4 is unnecessary. [14]

Proposed paragraph 6 of complaint counsel's order corresponds to the first "*It is further ordered*" paragraph of the initial decision. As reworded by ALJ Mathias it would cover only advertising claims that compare Litton with competing brands. We believe that this paragraph should, instead, be made coextensive with the substantive coverage of paragraph 1 (requiring substantiation for various claims) and have so changed it. We have also modified the language to correspond to our recent order in *Sears, Roebuck & Co., supra.* (Paragraph I(2) of Commission's Final Order.)

C. *Product Coverage*

The order recommended by ALJ Mathias would apply only to future advertising for "microwave ovens". Respondents agree that this is the proper scope of any order that may enter, while complaint counsel propose that the order be broadened to cover advertising for all "consumer products".

Court and Commission precedent yields no magic formula by which the product coverage of a given order may be divined. The purpose of any order is to prevent the repetition of violations of the law, by creating stringent monetary incentives (in the form of civil penalties) for its observance. The rationale for entry of a multi-product order based upon violations in the advertising of only one or

a few products is that many kinds of deceptive advertising are readily transferrable to a variety of products, and it would serve the public poorly to halt the use of a deceptive tactic in the advertising of one product if the respondent remained free to repeat the deceptive practice in another guise, with no threat of sanction save for another order to cease and desist. *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 394–5 (1965); *Sears, Roebuck & Co., supra,* slip op. at 10.

Relevant to any determination of the proper scope of an order is some assessment of the likelihood of repetition of the violation in the future. As we observed in our recent decision in *Sears, Roebuck & Co.,* such a judgment entails a necessarily imprecise prediction of the future. In making it, the Commission and courts have looked to a variety of factors, including the "nature of the violation itself (its magnitude and duration), the state of mind of the perpetrator (wilful, reckless, negligent, or unintending) and the prior history of violations by the respondents". *Sears, supra.,* slip op. at 11. [15]

An additional factor to be considered, and one that is implicit in *Sears* and the court decisions that it cites, is the burden imposed by an order viewed in light of the gravity of the offense that gives rise to it. In theory, this might seem to be an irrelevant consideration. If a heinous offense can be remedied, and related offenses fenced in, by a narrow order, no greater order can be entered. Conversely, if a less serious violation of law requires a broader order to remedy it, the mild nature of the offense should not preclude the imposition of necessary relief.

As a practical matter, however, the fashioning of many orders does not lend itself to mathematical precision. A variety of orders, reasonably related to the offense, are often possible to imagine, and this means that within certain parameters the Commission must exercise its discretion to determine the scope of the order that it actually issues. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611–13 (1946); *FTC* v. *Mandel Bros., Inc.,* 359 U.S. 385, 392 (1959). A reading of the court decisions leaves little doubt that this discretion should be exercised with some regard to the gravity of the violation that is being redressed, *e.g., Chrysler Corp.* v. *FTC,* 561 F.2d 357, 364 (1977); *Standard Oil Co. of California* v. *FTC,* 577 F.2d 653 (9th Cir. 1978).

Applying these considerations in this case, we believe that limitation of the first paragraph of the order to "microwave ovens" alone, as recommended by Judge Mathias, is appropriate, while those paragraphs added by the Commission on this appeal should apply to all "consumer products", as defined by respondents, I.D. p. 52, Tr. 4313–14.

We reject Litton's suggestion that the violation in this case was not

a serious one. As the law judge found, Litton's violation was not inadvertent; it made claims for its microwave ovens despite clear indication that it lacked a reasonable basis to make them. (I.D. pp. 47-8). Moreover, while dissemination of the offending advertisements was short-lived (perhaps because of the relatively rapid intervention by Commission staff) it was national in scope, and continued even after deficiencies in the ads were pointed out by FTC staff. To Litton's credit it did make some attempts to modify its advertisements when apprised of their shortcomings. (I.D. p. 48)

We do not believe that the violations in this case rise to the seriousness of those in *Sears,* as complaint counsel suggest, but they are more significant than respondents would acknowledge. Misuse of survey results, as noted before, has considerable potential to deceive, and is a technique that may be applied to a variety of products. [16]

Paragraph I(1) of the Commission's final order (ALJ's recommended paragraph 1, as modified) defines the violations in this case in relatively broad fashion and is, therefore, appropriately confined to microwave ovens as the ALJ recommended and as respondents urge. Similarly, the recordkeeping provision (Paragraph I(2)) will be limited to cover only claims governed by Paragraph I(1).

Those order paragraphs added by the Commission at complaint counsel's request [Final Order Paragraphs II(1), II(2), and II(3)] are narrower in focus, relating solely to the misuse and improper conduct of surveys and tests. Moreover, no recordkeeping requirements attach to these paragraphs. Under the circumstances, application of these paragraphs to a broader product line is reasonable and warranted to prevent recurrence of the same deceptive practices in a different guise.

In *Sears* the Commission imposed an order covering 14 specified categories of "major home appliances" based on misrepresentations of the characteristics of dishwashers. Litton does not produce home appliances other than microwave ovens. However, Litton has from time to time produced other "consumer products"[13] the advertising of which might lend itself to the misuse of test results. While the term "consumer products" is in theory broader than "major home appliances", given the reality of Litton's operations that term is even narrower than the product coverage in *Sears,* because Litton manufactures relatively few consumer products. We conclude, therefore, that the order as described above is suitable to remedy the violations found in this case.

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[13] At trial, Theodore Craver, a Litton official, defined "consumer product" to mean "one normally sold to the general public for their personal or household use." (I.D. p. 52) Under the circumstances of this case, we believe that defines an appropriate scope for Paragraph II of the Commission's order.

The order described is appended.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel supporting the complaint, and upon briefs and oral argument in support of and in opposition to the appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted the appeal in part, and denied the appeal in part. Therefore,

It is ordered, That the initial decision of the administrative law judge, pages 1–53, and appendices, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except as is otherwise inconsistent with the attached opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist be entered: [2]

ORDER

I

It is ordered. That respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale, or distribution of microwave ovens (either for commercial or consumer use), in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

1. Representing, directly or by implication, that any commercial microwave oven or consumer microwave oven

(a) is able to perform in any respect, or has any characteristic, feature, attribute, or benefit; or

(b) is superior in any respect to any or all competing products; or

(c) is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products,

unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination. Such reasonable basis shall consist of competent and reliable surveys or tests and/or other competent and reliable evidence which substantiates the representation. A competent and reliable survey or test means one in which persons qualified to do so conduct the survey or test and evaluate its

results in an objective manner, using procedures that insure accurate and reliable results.

2. Failing to maintain accurate records

(a) Of all materials that were relied upon in disseminating any representation covered by paragraph I(1) of this order, insofar as the text of such representation is prepared, authorized, or approved by any person who is an officer or employee of respondents, or of any division, subdivision or subsidiary of respondents, or by any advertising agency engaged for such purposes by respondents, or by any of its divisions or subsidiaries; [3]

(b) of all test reports, studies, surveys, or demonstrations that contradict any representation made by respondents that is covered by paragraph I(1) of this order.

Such records shall be retained by respondents for three years from the date that the representations to which they pertain are last disseminated, and may be inspected by the staff of the Commission upon reasonable notice.

II

It is further ordered, That respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale, or distribution of microwave ovens (either for commercial or consumer use) and any other product normally sold to members of the general public for their personal or household use in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

1. Misrepresenting in any manner, directly or by implication, the purpose, sample, content, reliability, results, or conclusions of any survey or test.

2. Advertising the results of a survey unless the respondents in such survey are a census or a representative sample of the population referred to in the advertisement, directly or by implication. A representative sample need not be a probability sample so long as when the ad is first disseminated respondents have a reasonable basis to expect the sampling method used would not produce biased results.

3. Representing, directly or by implication, that experts were

surveyed, unless reasonable care was taken to insure that the survey respondents possessed sufficient expertise to qualify as respondents for the survey and to answer the survey questions. For purposes of this order, an "expert" is an individual, group or institution held out as possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file [4]with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Commissioner Bailey did not participate.

IN THE MATTER OF

CONTROL DATA CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8940. Complaint, Oct. 3, 1973—Decision, Jan. 9, 1981

This consent order requires, among other things, two Bloomington, Minn. sellers of training courses to cease misrepresenting the purpose, significance or results of entrance examinations or aptitude tests; the qualifications or prerequisites necessary to obtain employment in the computer field or in any other field; and the cost and effectiveness of their job-placement services. Respondents are required to give prorated refunds to students who fail to complete their courses, or to compute the amount of money owed to them by students on a prorated basis. Students having unresolved complaints against the companies must be provided, on a shared-cost basis, with an impartial arbitration service empowered to order payment of refunds to those eligible. Additionally, the order requires that individuals selling training courses display nameplates identifying them as "Sales Representatives"; and that the companies institute a surveillance program designed to detect those parties who fail to comply with the terms of the order.

Appearances

For the Commission: *Steven D. Newburg-Rinn, Sharon S. Feather, Robert D. Friedman, Peter Greene* and *Edward Steinman.*

For the respondent: *Charles Price, Oppenheimer, Wolff, Foster, Shepard & Donnelly,* St. Paul, Minn., and *James H. Hogg,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Control Data Corporation, a corporation, and Automation Institute of America, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Control Data Corporation (hereinafter sometimes referred to as CDC) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at

8100 34th Ave. South, in the City of Bloomington, State of Minnesota. Respondent CDC is now, and for some time last past has been, engaged in the formulation, development, offering for sale, sale and distribution of courses of instruction intended to prepare graduates thereof for entry-level employment as computer operators, computer programmers or computer technicians. Respondent's volume of business in said courses of instruction has been, and is, substantial.

Respondent Automation Institute of America, Inc. (hereinafter sometimes referred to as AIA) is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 8100 34th Ave. South, in the City of Bloomington, State of Minnesota. It is a wholly-owned subsidiary of respondent Control Data Corporation. It is primarily engaged in the business of offering for sale, sale and distribution of courses of instruction intended to prepare graduates thereof for entry-level employment as computer programmers. Respondent AIA carries out its business aforesaid through franchisees which are authorized to solicit and write enrollments in said courses of instruction under the trade names "Automation Institute" or "Control Data Institute".

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. In the course and conduct of their business of offering for sale, sale and distribution of courses of instruction, respondents, through individuals and entities who have entered into franchise agreements with AIA, and through resident training facilities organized as branches of CDC's unincorporated division Career Entry Institutes, have induced members of the general public to enroll in various courses of instruction.

Respondents, through their said franchisees and branch facilities, place into operation and implement a sales program whereby members of the general public by means of advertisements placed in broadcast and printed media of general circulation, and by means of brochures, pamphlets and other promotional literature disseminated through the United States mails or by other means, and through the use of salesmen and sales personnel, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to sign contracts or enrollment agreements for a course of resident training of a stated length of time and for a stated tuition cost.

Respondents arrange or assist in the arrangement of credit and deferred payment terms for the financing of said executed contracts and accept the proceeds thereof or derive substantial income

therefrom in the form of royalty payments made by franchisees to AIA and in the form of interest payments made to respondent CDC's wholly-owned subsidiary, Commercial Credit Corporation.

Respondents arrange or assist in the arrangement of credit and deferred payment terms for the financing of said executed contracts and accept the revenues flowing from said executed contracts or derive substantial income therefrom in the form of royalty payments made by franchisees to AIA.

In the manner aforesaid, respondent CDC dominates, controls, furnishes the means, instrumentalities, service and facilities for, and condones, approves, and accepts the pecuniary and other benefits flowing from the acts and practices hereinafter set forth of respondents' branch facilities and franchisees of AIA.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents now cause, and for some time last past have caused, said aforementioned courses of instruction to be distributed from their places of business to said aforementioned branch facilities and franchisees located in various States of the United States other than the state of origination of said courses. Respondents transmit and receive, and cause to be transmitted and received, in the course of the sale of, distribution of and financing of their courses of instruction by said branch facilities and franchisees among and between the several States of the United States, retail installment contracts, royalty reports, checks, monies or other commercial paper. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said courses of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and to induce the purchase of their courses of instruction by members of the general public, respondents and their branch facilities and franchisees and the salespersons at the branch facilities and franchisees have disseminated, or caused the dissemination of, via the United States mail or other means, radio, television, newspaper, print media or other forms of advertising, or other means and instrumentalities which are furnished, approved or condoned by respondents. In conjunction therewith, respondents and their branch facilities and franchisees and the salespersons at the branch facilities and franchisees have made certain statements and representations respecting the large and growing demand for graduates of respondents' courses, the ease with which respondents' graduates are placed in positions for which they are trained, the lack of a need for formal education beyond high school in attaining employment,

the meaning of aptitude test results, the types of positions and salaries attained by graduates of respondents' courses, and projections of occupational demand and the future growth of employment in the field of electronic data processing derived from the biennial publication of the United States Department of Labor entitled "Occupational Outlook Handbook".

Typical of the statements and representations in said advertisements, but not all inclusive thereof, are the following:

A. Radio and Television

Computers are revolutionizing society . . . predicting elections, controlling traffic, figuring bank statements. *Most* businesses will be computerized, many of today's jobs will disappear. *Millions* of men and women will be involved with computers. So think of *your future* . . . You don't need college. If you are a *high school* grad and practical, you'll probably make it."

* * * * * * *

If you're losing more than your share, could be all you need is a little adjustment . . . like in baseball—a change-up. And one sure way is a short course at Control Data Institute . . . A course in computer programming or computer technology. You'll be surprised! Why, in a matter of months, you could become a valuable holdout the next time you sign, in whatever career you choose . . . In industry, business, even science.

* * * * * * *

The great thing about C.D.I. is that we care about you. So we don't waste your time. We give you a free career appraisal so you'll know out front if you can make it in the computer industry.

B. Newspaper and Direct Mail

Computer programming students receive training to qualify you for scientific and business programming on the latest computers and related equipment.

* * * * * * *

Enter the Professional ranks of Computer specialists.
- customer engineer
- field service representative
- computer programmer
- checkout technician
- systems analyst
- computer operator

* * * * * * *

Our institute offers bright young men and women a free computer aptitude test to determine their qualifications for the profession of computer programmer or technician.

* * * * * * *

If you had answered one of our ads a year ago, you'd now have a chance to double your present salary. It's a fact. The computer industry is booming and many graduates of Control Data Institute now earn twice as much as they did in their old jobs.

* * * * * * *

How to catch up with college graduates in less than a year. College graduates used to have it over everybody else. In salaries, prestige, prospects for the future Now, at Control Data Institute you can qualify for a position in the computer industry that matches or exceeds the salary of most recent college graduates.

* * * * * * *

Most people think it's pretty tough to crack into the computer business. That gives our graduates a chuckle. Graduates of Control Data Institute have plenty of reason to smile. When they graduate, major companies will come from all over the country to interview and hire them.

* * * * * * *

Think, for a moment, about the computer industry—a high-paying industry where the demand for competent people far exceeds the supply.

* * * * * * *

You never hear anyone saying it's rough to make a living in the computer industry. That's because trained computer personnel are so much in demand. Thousands of new high-paying job opportunities open up every year. And there simply aren't enough men and women around with the kind of training today's industries are looking for.

* * * * * * *

Why consider a career in the computer industry? There has probably never before been a field offering men and women so many opportunities for good salaries and rapid promotion. Positions are opening up in many job classifications . . . exciting and challenging jobs in a wide variety of industries. It takes trained personnel to fill these jobs, and providing these personnel is our job at Control Data Institute.

* * * * * * *

Computer technology is one of the fastest growing, highest paying, most challenging, and rapidly advancing sciences in the country today. In such a climate, the demand is greater than the supply. Both men and women are in demand—with the proper training. In fact, if you act now, in less than a year you could be on your way to a successful career in computers. Hundreds of employers actively seek our students. Our placement service can introduce you to one of them after you graduate.

* * * * * * *

According to the U.S. Department of Labor, thousands of people will be needed to fill new jobs created by the rapidly expanding use of computers in business, industry

and government. Most industry experts, in fact, predict that the number of data processing jobs will more than double in the next five years.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents and their branch facilities and franchisees and the salespersons of the branch facilities and franchisees have represented, directly or by implication, that:

1. There is an urgent need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

2. Respondents had a reasonable basis from which to conclude that:

(a) there was at the time such representations were made, or

(b) would be at the time that persons then enrolling graduated from respondents' courses,

an urgent need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

3. All or substantially all of respondents' graduates are able, on graduation, to secure the positions for which respondents have trained them.

4. Respondents had a reasonable basis from which to conclude:

(a) that at the time such representations were made a substantial number of respondents' graduates were being hired, or

(b) that a substantial number of persons then enrolling in respondents' courses would upon graduation, be hired

by certain large, well-known industrial corporations or government agencies in the positions for which respondents train such persons.

5. College education is not necessary or advantageous for the placement of respondents' graduates in positions for which respondents train such persons.

6. The position of systems analyst is an entry-level employment objective of respondents' course of instruction.

7. All that is necessary for the placement of respondents' graduates as programmers in scientific applications is the completion of respondents' course in computer programming.

8. Respondents' entrance examination aptitude tests determine whether or not a person has the aptitude to work as a computer programmer or technician and to succeed in such positions.

9. Respondents had a reasonable basis from which to conclude

that most people who take respondents' aptitude tests either do not qualify or show that they have much less aptitude for respondents' courses than the particular applicant being tested.

10. Respondents had a reasonable basis from which to conclude that a substantial percentage of

(a) persons graduating from respondents' courses, at the time such representations were made, were earning; or

(b) persons then enrolling in respondents' courses would earn when they graduated,

twice as much as they did at the time they enrolled in respondents' courses.

11. Respondents had a reasonable basis from which to conclude that a substantial percentage of

(a) persons graduating from respondents' courses, at the time such representations were made, were earning; or

(b) persons then enrolling in respondents' courses would earn when they graduated,

salaries that match or exceed the salaries of most recent college graduates, even though such persons were not college graduates.

12. The placement assistance furnished by respondents is free.

13. Respondents' graduates who seek employment in the field of electronic data processing do not find it necessary, in many instances, to seek said employment through sources other than respondents' placement office.

PAR. 6. In truth and in fact:

1. At the time it was so represented there was not an urgent need or demand for all or most of respondents' graduates, in positions for which respondents train such persons.

2. Respondents had no reasonable basis from which to conclude that:

(a) there was at the time such representations were made, or

(b) would be at the time that persons then enrolling graduated from respondents' courses,

an urgent need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

3. All or substantially all of respondents' graduates are not able, on graduation, to secure the positions for which respondents have trained them.

4. Respondents had no reasonable basis from which to conclude:

(a) that at the time such representations were made a substantial number of respondents' graduates were being hired, or

(b) that a substantial number of persons then enrolling in respondents' courses would upon graduation, be hired

by certain large, well-known industrial corporations or government agencies in the positions for which respondents train such persons.

5. In most instances college education is advantageous for the placement of respondents' graduates as programmers and in many instances college education is necessary for such placement.

6. The position of systems analyst is not an entry-level employment objective of respondents' course of instruction.

7. In many instances a college degree in a science or mathematical discipline is necessary for the placement of respondents' graduates as a programmer in scientific applications.

8. Respondents' entrance examination aptitude tests do not determine whether or not a person has the aptitude to work as a computer programmer or technician and to succeed in such positions. Respondents' entrance examination aptitude tests are designed only to determine whether or not a person will be likely to complete any of the courses of instruction offered by respondents.

9. Respondents had no reasonable basis from which to conclude that most people who take respondents' aptitude tests either do not qualify or show they have much less aptitude for respondents' courses then the particular applicant being tested.

10. Respondents had no reasonable basis from which to conclude that a substantial percentage of

(a) persons graduating from respondents' courses, at the time such representations were made, were earning; or

(b) persons then enrolling in respondents' courses would earn when they graduated,

twice as much as they did at the time they enrolled in respondents' courses.

11. Respondents had no reasonable basis from which to conclude that a substantial percentage of

(a) persons graduating from respondents' courses, at the time such representations were made, were earning; or

(b) persons then enrolling in respondents' courses would earn when they graduated

salaries that match or exceed the salaries of most recent college graduates, even though such persons were not college graduates.

12. The placement assistance furnished by respondents is not free, but rather included in the tuition cost of respondents' courses.

13. Respondents' graduates who seek employment in the field of electronic data processing do find it necessary, in many instances, to seek said employment through sources other than respondents' placement office.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were, and are, false, misleading or deceptive acts or practices.

PAR. 7. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of their courses by the general public, respondents and their branch facilities and franchisees, directly or indirectly have held out commissioned salespersons to be qualified or trained vocational counselors, or instructed their salespersons to create a "counseling" atmosphere during selling sessions. Respondents thereby have falsely and deceptively represented that such persons were in a position to give disinterested advice to prospective students as to the best career choice for them, when in fact such persons had a direct or indirect economic interest in whether the applicants enrolled at the CDI or AIA.

Therefore, respondents' statements, representations, acts and practices, as set forth herein were, and are, false, misleading, deceptive and unfair acts or practices.

PAR. 8. Through the use of the aforesaid advertisements and otherwise, respondents have represented directly or by implication, that there was at the time of the representation or would be at the time of graduation from respondents' courses an urgent need or demand for respondents' graduates in positions for which respondents train such persons; that substantial numbers of respondents' graduates were being hired by certain large, well-known, industrial corporations or government agencies; that graduates of respondents' courses of instruction earn upon graduation twice as much as they did at the time they enrolled in respondents' courses; and that such graduates earn upon graduation salaries that match or exceed the salaries earned by recent college graduates. At the time of the said representations respondents had no reasonable basis adequate to support such representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 9. Respondents and their branch facilities and franchisees,

and the salespersons of the branch facilities and franchisees, have represented directly or by implication, through the use of misleading course names and descriptions, that the primary course objectives of their Programming Technology, Computer Programming and Systems Analysis, Computer Technology, and similarly named courses are the achievement of entry-level employment as a computer programmer, systems analyst and computer technician.

In truth and in fact:

The actual course objectives of the aforesaid courses include many positions which are less prestigious and for which the pay is less than the entry-level positions which respondents represent to be the course objectives of these courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 10. Respondents offered for sale courses of instruction intended to prepare graduates thereof for entry-level employment as computer operators, computer programmers or computer technicians without disclosing in advertising or through their sales representatives: (1) the percentage of recent graduates of each school for each course offered, that were able to obtain employment in the positions for which they were trained; (2) the employers that hired any such recent graduates for each course offered; (3) the initial salary any such recent graduates received for each course offered; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts would be an indication of the probability of graduating from respondents' courses and would indicate the possibility of securing future employment upon graduating and the nature of such employment. Thus, respondents have failed to disclose material facts, which if known to a consumer would be likely to effect his or her consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 11.

(a) Respondents as aforesaid, have been, and are now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction whose value to the said persons for future employment in the jobs for which training was offered was virtually worthless. Respondents have received the said sums and have failed to offer to

refund and refuse to refund such money to such purchasers of their course.

The use by respondents of the aforesaid practices and their continued retention of the said sums, as aforesaid, is an unfair act or practice.

(b) In the alternative and separate from subparagraph (a) above, respondents, who are in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of courses of vocational instruction, have been and are now, as aforesaid, failing to disclose material facts while using false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction.

The effect of using these aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain or prevent competition between the respondent and the aforesaid competitors.

PAR. 12. By and through the use of the aforesaid acts and practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 13. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of instruction covering the same or similar subjects.

PAR. 14. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true, and to induce a substantial number thereof to purchase respondents' courses by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of

Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Control Data Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 8100–34th Ave. South, in the City of Bloomington, State of Minnesota.

2. Respondent Automation Institute of America, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of California with its offices and principal place of business located at 8100–34th Ave. South in the City of Bloomington, State of Minnesota.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

Definitions

The terms "*course,*" "*course of study,*" or "*course of study, training or instruction,*" as used in this order, shall be defined as any entry-level vocational course of instruction, which shall mean the following: any course of instruction designed to prepare the graduates of such course for positions of employment available to persons who

possess no prior training or experience other than that gained from the course of instruction. This definition of "*course,*" "*course of study,*" or "*course of study, training or instruction*" shall not constitute, nor be deemed to constitute, an interpretation or evidence of interpretation of any definition contained in the Commission's Trade Regulation Rule governing proprietary, vocational and home study schools (16 C.F.R. 438.1 (1979)). The definition of "*course,*" "*course of study,*" or "*course of study, training or instruction,*" for purposes of the Order, shall not include any course offered or sold to employers for the use of their employees or their families.

The term "*respondents,*" as used herein, shall mean Control Data Corporation and Automation Institute of America, Inc.

I

It is ordered, That respondents Control Data Corporation, a corporation, and Automation Institute of America, Inc., a corporation, their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, franchisee, licensee, distributor or other device, in connection with the creating, advertising, promoting, offering for sale, sale or distribution of any course of study, training or instruction in the field of electronic data processing or any other course offered to the public in any field in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, orally, visually, in writing or in any manner, directly or by implication, that:

(a) College education or training beyond a high school diploma is not necessary or advantageous for the placement of any person as a programmer in the field of electronic data processing, or that any person with only a high school education or its equivalent may achieve employment as a programmer in the electronic data processing field, unless in each and every such instance it is disclosed, in immediate and conspicuous conjunction therewith, that college education or training beyond a high school diploma may be advantageous for placement as programmer in the field of electronic data processing because some employers require such education or training for programming; or misrepresenting, orally, in writing or in any manner, any qualification or prerequisite necessary to achieve employment in any field or position;

(b) Any entrance examination or aptitude test determines whether or not a person will achieve employment in the field of electronic data processing; or misrepresenting, orally, in writing, or in any

manner the meaning, purpose, benefit, significance or use of any entrance examination, aptitude test or the results thereof;

(c) Most people who take any entrance examination or aptitude test do not achieve a passing or qualifying grade or score, or score lower on such test than the particular applicant, unless such respondent so representing has, in each and every instance, statistically valid data to verify such representation; or misrepresenting, orally, in writing, or in any manner the pass or fail rate of any such entrance examination or aptitude test, or the score attained by any individual relative to, or compared with, grades or scores attained by any other or all other persons taking such entrance examination or aptitude test;

(d) Systems Analysis is an entry-level employment objective of any course of instruction offered by either respondent, unless such is the fact; or misrepresenting, orally, in writing, or in any manner, including the use of course names, descriptions or occupational objectives, the nature or type of position for which a graduate of any course of instruction may be qualified or in which such a graduate may achieve employment upon completion of the course of instruction;

(e) It is unnecessary for any graduate of any course of instruction offered by either respondent actively to seek employment through any source other than that made available by such respondent's placement service; or misrepresenting, orally, in writing, or in any manner, the capabilities, functions or performance of any placement service, or the duties, obligations or responsibilities of any person who seeks placement assistance;

(f) The placement assistance furnished by either respondent is free or without cost; or misrepresenting, orally, in writing, or in any manner, the cost of any placement assistance or service;

(g) Any graduate of any course of instruction offered by either respondent is assured of employment in any position for which training has been offered; or misrepresenting orally, in writing, or in any manner, the degree of ease or difficulty associated with obtaining employment or the effectiveness of any placement service in obtaining employment for either respondent's graduates;

(h) Any person engaged in connection with the promotion, offering for sale, sale, distribution or other marketing function for any course of instruction is a vocational counselor or is in any position not associated with marketing such course of instruction; or misrepresenting orally, in writing, or in any manner, the manner of compensation, training, experience, title, status, qualifications, or functions of any such person so engaged; or misrepresenting in any

manner the nature of the relationship between anyone associated with the marketing of any course of instruction and any prospective student of such course of instruction.

II

It is further ordered, That, if the provisions of Sections 438.4 through 438.6 of the Commission's Trade Regulation Rule for Proprietary Vocational and Home Study Schools (16 C.F R. 438 (1979)), pertaining to "Cancellation and Refund Procedures After Cooling-Off Period" are not effective when this Order becomes effective, or are subsequently set aside or otherwise annulled by any court of law or Congressional Act, those provisions, as set forth in Appendix A,* shall immediately be incorporated into this Order. Additionally, if the provisions of Section 438.3(f) of the Rule are not effective when this Order becomes effective, or are subsequently set aside or otherwise annulled by any court of law or Act of Congress, those provisions, as also set forth in Appendix A, shall immediately be incorporated into this Order but only to the extent that the Section applies to express jobs or earnings claims. The foregoing provisions will remain a part of this Order only for such periods as they, or any requirements which pertain to refunds in the event of cancellation after cooling-off, are not part of any Trade Regulation Rule which may be in effect thereafter. With the exception of the definition of "course" (Section 438.1(c)), all definitions in the Rule necessary to carry out the purpose of the provisions above will be incorporated into the Order in the same manner as set forth above. The requirements of this Part shall be subject to, and governed by, the understandings expressed in Appendix B* attached hereto.

III

It is further ordered, That:

1. Each respondent shall agree, in writing, in any enrollment contract, or other agreement to furnish educational instruction services, with each enrollee in each course covered by this Order, to and shall:

A. Provide each such enrollee with the right to request, at any time during the period beginning with the date of enrollment and ending ninety (90) days following such enrollee's disenrollment, termination, or graduation from such course of instruction, informal

* Not reproduced herein for reasons of economy.

resolution of a claim, filed in the form of a completed, signed Student Complaint Questionnaire, a blank copy of which is attached hereto as Appendix C,* which questionnaire must be received by respondent at the address designated on the Questionnaire within such ninety (90) day period, when:

(i) Such claim is based upon an alleged representation or promise, either express or implied, made by a representative of such respondent in connection with such enrollee's enrollment, which representation or promise was allegedly a significant factor in leading such enrollee to enroll in such course of instruction; and

(ii) Such representation or promise allegedly was not fulfilled by such respondent and allegedly resulted in a serious diminution of a significant value or benefit of such course of instruction to such enrollee.

B. Arbitrate, at the election and upon the demand of such enrollee, such claim under the supervision of the American Arbitration Association and in accordance with and subject to the Rules and Procedures for Arbitration, and to the extent not inconsistent therewith, the Rules of the American Arbitration Association, as may be amended from time to time, both attached hereto as Appendix D,* under the circumstances and subject to the conditions set forth therein;

C. Provide the right, in the event such arbitration results in an award favorable to such enrollee, to have judgement entered upon such award by any court of competent jurisdiction, subject to the right of judicial review.

2. Contemporaneous with the making of the agreement required by Paragraph 1 of this Part of this Order, each respondent shall provide each enrollee in any course described in said Paragraph 1 with the following information in a complete, clear and concise manner (a copy of the document containing such information is attached hereto as Appendix E*):

(i) the method for initiating the complaint resolution procedures described in Paragraphs 1 and 3 of this Part of this Order;

(ii) the cost and consequence of such complaint resolution procedures;

(iii) the designation of the location where the "Student Complaint

* Not reproduced herein for reasons of economy.

Questionnaire" form, described in said Paragraph 3, may be obtained;

(iv) the name and mailing address of the person or persons designated by such respondent to receive such completed, signed Questionnaire;

(v) the instruction that any Questionnaire submitted to such designee or any acceptance of alternative or partial relief should be submitted, via certified mail, return receipt requested, to provide such enrollee with a record of the date such correspondence was received by such designee; and

(vi) the complete text of the Rules and Procedures for Arbitration, and to the extent not inconsistent therewith, the Rules of the American Arbitration Association, as may be amended from time to time, both attached hereto as Appendix D.

3. A. Each respondent shall (i) provide, upon request, such Student Complaint Questionnaire to any enrollee in any course of instruction described in Paragraph 1 of this Part of this Order and (ii) make available for such enrollee's inspection and copying the instructions and explanation, attached hereto as Appendix E, and a copy of the Rules and Procedures for Arbitration, and to the extent not inconsistent therewith, the Rules of the American Arbitration Association, as may be amended from time to time, both attached hereto as Appendix D, at a designated, accessible location at each of their educational facilities offering any such course of instruction.

B. In the event a designated representative of either respondent receives a completed, signed Questionnaire from any such enrollee, such respondent shall, within five (5) business days following such designee's receipt of such Questionnaire, mail a written acknowledgement of receipt to such enrollee stating the date on which such Questionnaire was received.

C. Within thirty (30) days of said designee's receipt of a completed, signed Questionnaire, such respondent shall elect to grant and/or deny in whole or in part the relief requested by such enrollee and shall mail to such enrollee a written statement of its decision. In the event said decision denies the relief requested, either in whole or in part, and/or offers a form of relief other than that requested, said written statement shall also include a brief statement of the reasons for such denial and/or offer of alternative relief. In the event such respondent elects to grant part of the requested relief or a form of relief other than that requested, such respondent shall grant such enrollee at least fifteen (15) days within which to place in the mail written notification of his or her acceptance of such proffered relief

in full satisfaction of such enrollee's claim, and shall so inform such enrollee.

D. In the event such respondent elects to grant all of the relief requested by such enrollee, such respondent shall effect the granting or, as the facts require, commence the granting of such relief within forty-five (45) days of its designee's receipt of the completed, signed Questionnaire. In the event such enrollee elects to accept partial or alternative relief, such respondent shall effect or, as the facts require, commence the granting of such relief within fifteen (15) days of receipt of such enrollee's acceptance of such relief.

4. Neither respondent shall fail to:

A. Within the time periods provided in this Part of this Order, make refund, effect cancellation of future monetary obligation(s), or provide such other relief as such respondent may offer and which the enrollee accepts:

(i) to any enrollee who complies with the procedures for filing a claim as set forth in this Part, and to whom such respondent agrees to provide relief; or

(ii) to any student who invokes arbitration pursuant to this Order, and who receives an award pursuant thereto which is not moved for judicial review by either party within the time limit prescribed by applicable state law; or

B. Adhere to the Rules and Procedures for Arbitration, and to the extent not inconsistent therewith, the Rules of the American Arbitration Association, as may be amended from time to time, both attached hereto as Appendix D, which are incorporated by reference within the terms of this Order.

C. Create and maintain, for a period ending three (3) years after the use of the enrollment contract or agreement described below is terminated, or after an enrollee executes a document acknowledging receipt of the instructions and explanation described below, and during such time period make available for inspection and copying by Commission staff members upon reasonable notice and during regular business hours, and after compliance with any federal law concerning the privacy or confidentiality of student records when applicable and necessary to do so:

(i) a copy of each different form of enrollment contract, or other agreement to furnish educational instruction services, for each course covered by Parts I and II of this Order;

(ii) a copy of each different document containing any information

incorporated by reference in such contract or agreement pertaining to the requirements of this Part of this Order; and

(iii) for each enrollee in each such course of instruction, a copy of the document executed by such enrollee at the time of enrollment acknowledging receipt of the instructions and explanation, described in Paragraph 2 of Part III of this Order and attached as Appendix E, for initiating the complaint resolution procedures set forth in this Part of this Order.

D. Create for each enrollee who has initiated the complaint resolution procedures set forth in this part of this Order each adequate record described below, where applicable to fully document each action taken in such complaint resolution procedure, and maintain such records for a period of three (3) years after the last action taken in connection with such enrollee's initiation of such procedures, and within said time period make each such record available for inspection and copying by Commission staff members upon reasonable notice and during regular business hours and after compliance with any federal law concerning the privacy or confidentiality of student records, when applicable and necessary to do so:

(i) which reveal the full and complete content of:

a) the completed, signed Student Complaint Questionnaire submitted by such enrollee to either respondent as described in Paragraph 3.B. of this Part of this Order, and

b) each item of correspondence required or described in this Part of this Order respecting such Questionnaire, and which reveal the dates each such item of correspondence was mailed and/or received, as required by this Part of this Order;

(ii) which demonstrate that any relief granted in connection with such Questionnaire pursuant to Paragraph 3.D. of this Part of the Order was effected or commenced within the time periods prescribed in said Paragraph;

(iii) which reveal the full and complete content of the notice of initiation of arbitration proceedings by such enrollee pursuant to this Part of this Order received by such respondent from the American Arbitration Association, including full and complete content of the copy of the Student Complaint Questionnaire submitted by such enrollee to initiate arbitration and of all documents attached thereto;

(iv) which reveal the full and complete content of each document submitted to the arbitrator by such respondent in connection with

such arbitration proceeding and, when a copy is provided to such respondent, each document submitted by such enrollee to the arbitrator in connection with such arbitration proceeding;

(v) which reveal the full and complete content of the written award of the arbitrator concluding such arbitration proceeding, including any simple statement of reasons accompanying such award;

(vi) which reveal the full and complete content of each petition filed by such respondent or such enrollee to have such award reviewed by any court of competent jurisdiction, and the final decision of such court in disposition of such petition; and

(vii) which demonstrate that such respondent has timely effected the granting of the relief awarded to such enrollee by the arbitrator in such arbitration proceeding.

IV

1. *It is further ordered,* That:

(a) Respondents herein deliver a copy of this decision and order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, independent contractors and any other person who promotes, offers for sale, sells or distributes any course of instruction included within the scope of this Order, *provided, however,* that respondents shall have no obligation to deliver a copy of this Decision and Order to:

(i) Any public or non-profit, degree-granting educational institution; any professional or trade association; any federal, state or local governmental agency; or any employer when and to the extent that a course is offered or sold to employers for the use of employees or their families; or

(ii) Any person or entity whose sales, marketing, advertising and promotional practices are not directed, controlled or approved by either respondent or subject to either respondent's direction, control, or approval; or

(iii) Any person or entity that does not receive any sales, marketing, advertising or promotional advice, instrumentalities, training or materials from either respondent, directly or indirectly, *excepting* sales, marketing, advertising and promotional advice, instrumentalities, training and materials solely relating to and concerning (A) the technical aspects, features, characteristics or properties of any equipment, including any programming materials, received from either respondent, or (B) the content, organization or

educational purpose (other than achieving or obtaining employment) of any course of instruction, including any tests or other similar teaching or educational materials, received from either respondent;

provided, further, however, and notwithstanding the foregoing exemptions, that respondents shall deliver a copy of this Decision and Order to:

(i) Any person or entity, other than those referenced in subparagraph 1(a)(i) above, that either respondent licenses to use any of the names Control Data Corporation, Control Data, Control Data Institute, or Automation Institute, or any other name either respondent may designate its corporate entity or any franchised educational facility offering a course of study, training, or instruction, as all or part of the name of such person's or entity's educational institution; or

(ii) Any person, or any entity formed by any such person or persons, who purchases any of respondents' Control Data Institutes, Automation Institutes or any other facility offering any course covered by Parts I and II of this Order, and who prior to such purchase was engaged as an employee or agent of either respondent in managing, controlling, administering, or in selling, marketing, advertising, or promoting for the headquarters management or any facility of Control Data Institute or Automation Institute.

(b) Respondents herein provide each person or entity not exempted from subparagraph (a) of this Paragraph with a form statement, a copy of which shall be signed by such person or on behalf of such entity and returned to respondents, clearly stating their intention to be bound by and to conform their business practices to the requirements of this Order; retain such statement during the period such person or entity is so engaged; and, upon reasonable notice and during regular business hours, make such statement available to the Commission's staff for inspection and copying;

(c) Respondents herein inform each of the persons or entities subject to subparagraph (a) of this Paragraph that respondents will not use or engage or will terminate the use or engagement of the services relating to matters within the scope of this Order of any such person or entity unless such person or entity agrees to and does file notice with respondents that they will be bound by the provisions contained in this Order;

(d) If any person or entity subject to subparagraph (a) of this Paragraph fails to agree to file the form provided for in subparagraph (b) of this Paragraph with respondents and be bound by the

provisions of this Order, respondents shall not use or engage, or continue the use or engagement of, said person or entity to promote, offer for sale, sell or distribute any course of instruction included with the scope of this Order;

(e) Respondents herein inform each of the persons or entities subject to subparagraph (a) of this Paragraph that respondents are obligated by this Order to discontinue dealing with or to terminate the use or engagement of persons or entities, to provide, offer for sale, sell or distribute any course of instruction within the scope of this Order, who continue the use of any deceptive acts or practices prohibited by this Order;

(f) Respondents herein institute a program of continuing surveillance designed to reveal whether the business practices of each such person or entity subject to subparagraph (a) of this Paragraph conform to the requirements of this Order; and

(g) Respondents herein discontinue dealing with or terminate the use or engagement of any person or entity subject to subparagraph (a) of this Paragraph, to promote, offer for sale, sell or distribute any course of instruction within the scope of this Order, as revealed by the aforesaid program of surveillance, who continues any act or practice prohibited by this Order.

2. *It is further ordered,* That respondents, in connection with the advertising, promotion, offer for sale, sale or distribution of any course of study, training or instruction:

(a) provide each of their sales representatives with a name plate clearly and conspicuously bearing the sales representative's name and legend "Sales Representative," and place said name plate in each such sales representative's office in a conspicuous manner so that it will be clearly visible to any applicant communicating with such sales representative; and

(b) present to each applicant or prospective student, immediately prior to the commencement of the initial interview or sales presentation with any sales representative of either respondent during which the purchase of or enrollment in any such course of instruction offered by either respondent is discussed, a business card containing, in a clear and conspicuous manner, located in the approximate center of said card, in eleven-point type of the same style and in the same color ink, the following information and none other:

(i) the name of the sales representative; and

(ii) the designation, "Sales Representative,"

except that such card may also contain in the approximate lower half of such card, the logo-type of the appropriate respondent and, in not more than eight-point type, the name of such respondent and the name, address and telephone number of the educational facility.

3. *It is further ordered,* That Part I of this Order shall become effective immediately upon this Order becoming final; and that all other parts of this Order shall become effective 90 days after this Order becomes final.

4. *It is further ordered,* That the respondents shall forthwith distribute a copy of this Order to each of their domestic operating divisions.

5. *It is further ordered,* That the respondents notify the Commission at least thirty (30) days prior to any proposed change in either of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondents which may affect compliance obligations arising out of this Order.

6. *It is further ordered,* That, in addition to all other reports required by this Order, the respondents, within sixty (60) days after service upon them of this Order, shall file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Pitofsky did not participate.

In the Matter of

CHRYSLER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9072. Complaint, Feb. 10, 1976—Decision, Jan. 9, 1981

This consent order requires, among other things, Aurora Chrysler-Plymouth, Inc., a Seattle, Wash. automobile dealership, to adopt and adhere to the "Repossessed Vehicle Surplus/Deficiency system" established by Chrysler Corporation pursuant to the disposition of Docket 9072 as to Chrysler Corporation. The firm is further required to establish to the reasonable satisfaction of the Commission that it has paid all surpluses realized from February 10, 1973 from repossessed vehicles returned to the company; corrected all prior erroneous credit reports; and provided credit reporting agencies with corrected information.

Appearances

For the Commission: *Dean Fournier, Bruce D. Carter, Sharon S. Armstrong, David Bricklin* and *Stevan Phillips.*

For the respondent: *Louis D. Peterson, Hillis, Phillips, Cairncross & Martin,* Seattle, Wash.

Complaint

The Federal Trade Commission, having reason to believe that Chrysler Motors Corporation, Chrysler Credit Corporation, and Aurora Chrysler-Plymouth, Inc., corporations, have violated the provisions of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint.

Paragraph 1. *Respondents.* Respondent Chrysler Motors Corporation ("Chrysler Motors") is a Delaware corporation with its office and principal place of business at 12000 Oakland Ave., Highland Park, Michigan. It is a wholly-owned subsidiary of Chrysler Corporation.

Respondent Chrysler Credit Corporation ("Chrysler Credit") is a Delaware corporation with its office and principal place of business at 16250 Northland Drive, Southfield, Michigan. It is a wholly-owned subsidiary of Chrysler Financial Corporation, which is wholly-owned by Chrysler Corporation.

Respondent Aurora Chrysler-Plymouth, Inc. ("Aurora") is a Delaware corporation with its office and principal place of business

at 13733 Aurora Ave. North, Seattle, Washington. It is a wholly-owned subsidiary of Chrysler Motors Corporation.

Allegations stated below in the present tense include the past tense.

PAR. 2. *Respondents' Business.* Chrysler Motors manufactures, distributes and sells motor vehicles, including automobiles and trucks. It also owns all or part of the voting stock of various retail dealers of its vehicles, whose business operations and policies it controls. It is responsible for the acts and practices of Aurora and its other wholly- or partially-owned dealers.

Wholly- or partially-owned as well as independent retail Chrysler dealers are referred to below as "Chrysler dealers."

Chrysler Credit is a finance company which provides retail financing to customers of Chrysler dealers for their retail installment contract purchases of new and used motor vehicles. It also provides wholesale financing for inventories held by Chrysler dealers.

Aurora is a wholly-owned Chrysler dealer selling new and used motor vehicles.

PAR. 3. *Commerce.* Each of respondents participates in some or all phases of the sale, distribution and repossession of motor vehicles, and in the transmission across state lines of contracts, monies, and other business papers related to the extension and enforcement of credit obligations. Respondents each maintain a substantial course of trade in motor vehicles and motor vehicle credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. *Retail Installment Contract Sales.* Aurora and most other Chrysler dealers arrange financing through Chrysler Credit or other lenders for retail sales of motor vehicles to their customers. Most of the sales to be financed by Chrysler Credit are executed on a printed "retail installment contract" form provided by Chrysler Credit, naming the customer as buyer and the dealer as seller. This "retail installment contract" form indicates that the contract is to be assigned to Chrysler Credit for value, that the buyer is to be indebted to the dealer or its assignee, and that the dealer or its assignee is to be a secured party holding security interest in the vehicle sold. In the event the buyer defaults, Chrysler Credit and Aurora and other retail Chrysler dealers have also undertaken the obligation, by express or implied representations in their retail installment contracts, to account to the defaulting buyer for any surplus arising from the resale of repossessed collateral. This obligation is reaffirmed after default in notices sent to defaulting buyers by Chrysler

Credit. These representations have the tendency and capacity to lead buyers to a reasonable expectation that Chrysler Credit will refund any surplus.

PAR. 5. *Statutory Duty to Account for Surplus.* The respective rights and duties of the defaulting buyer and secured party after repossession are defined by state commercial law, derived by almost every state from Article Nine of the Uniform Commercial Code, and the retail installment contract. State law requires the secured party, after repossessing and/or disposing of the collateral, to account to the defaulting buyer for any surplus of proceeds from the sale or disposition in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees.

PAR. 6. *Post-Default Procedures Determined by Master Agreement.* In instances where Chrysler Credit as secured party declares a default, it usually repossesses or causes repossession of the vehicle. The procedures followed by Chrysler Credit and the dealer after repossession are determined by a master vehicle financing agreement between Chrysler Credit and the dealer, as well as by the terms of the assignment of each retail installment contract to Chrysler Credit. A substantial majority of the agreements executed between Chrysler Credit and Chrysler dealers in the United States are repurchase or similar agreements (hereinafter "repurchase" agreements).

PAR. 7. *Repurchase Transfer and Payoff.* Pursuant to the agreements described in Paragraph Six, Chrysler Credit in most instances returns the repossessed vehicle to the repurchase dealer and receives from the dealer a payoff, consisting of the unpaid balance of the retail installment contract adjusted by applicable charges and credits. The dealer then resells the vehicle to a third party.

PAR. 8. *Joint Liability.* Under applicable state law, a dealer who receives a transfer of collateral from a secured party pursuant to a repurchase agreement has a duty to properly dispose of the collateral and to account to the defaulting buyer for any surplus. Chrysler Credit also is obligated to ensure that a proper disposition of the collateral is made and that a proper accounting for any surplus is given to the defaulting buyer. Chrysler Credit shares this obligation jointly with the dealer because (1) it continues to be the secured party and continues to be a fiduciary with respect to the defaulting buyer's equity interest; (2) Chrysler Credit, as assignor of the contractual duties of a secured party, continues to be liable for performance of those duties; (3) Chrysler Credit has dictated, controlled and acted jointly with the repurchase dealer in executing

relevant aspects of the credit transaction; and (4) Chrysler Credit has made representations to buyers, as set forth in Paragraph Four, that these duties would be properly performed.

PAR. 9. *Failure to Account for Surpluses.* In a substantial number of instances Chrysler Credit, Aurora, and other Chrysler repurchase dealers, have (1) failed to institute or follow correct procedures for determining the existence or amounts of surpluses realized from the sale of repossessed vehicles, (2) failed to disclose the existence of these surpluses to defaulting buyers, and (3) wrongfully retained such surpluses in violation of the defaulting buyers' statutory and contractual rights. The failure to identify and disclose surpluses has concealed their existence from these consumers and consequently few have asserted their rights under applicable state law. The failure to remit surpluses has deprived numerous consumers of substantial amounts of money rightfully theirs and has unjustly enriched Chrysler Credit and its repurchase dealers. These practices are therefore unfair and deceptive.

PAR. 10. *Misrepresentation of Right to Deficiency.* Chrysler Credit provides to dealers and Chrysler dealers make use of retail installment contracts which represent that the seller or its assigns shall seek any deficiency due on a retail installment contract. In many instances state law limits or denies this right. These representations have the tendency and capacity to induce defaulting buyers to pay sums to which the dealer, Chrysler Credit, or its assigns is not entitled or otherwise to change their position to their detriment. Therefore, use of these misleading contracts is unfair and deceptive.

PAR. 11. *Failure to Disclose Material Facts Concerning Redemption.* Chrysler Credit and its repurchase dealers fail, in some instances, to inform defaulting buyers of facts necessary to their exercise of the right of redemption granted by state law, including but not limited to (1) the nature and duration of the right to redeem, and (2) the amount required to redeem. This failure to disclose material facts has the tendency and capacity to hinder defaulting buyers in exercising the right to redeem and is therefore an unfair and deceptive act or practice.

PAR. 12. *Owned Chrysler Dealers Using Non-Chrysler Credit Financing.* Aurora and a number of other wholly- or partially-owned Chrysler dealers engage in the acts and practices ascribed to dealers in Paragraphs Nine, Ten and Eleven, in instances where retail installment financing for their customers is obtained from finance institutions other than Chrysler Credit. These acts and practices, for the reasons stated above, are unfair and deceptive.

PAR. 13. *Conclusion.* The acts and practices of respondents set

forth in Paragraphs Nine, Ten, Eleven and Twelve are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

Decision and Order as to Aurora Chrysler-Plymouth, Inc.

The Commission having heretofore issued its complaint charging Aurora Chrysler-Plymouth, Inc. and others with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint together with a proposed form of order; and

Respondent Aurora Chrysler-Plymouth, Inc., its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by said respondent of the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the complaint, and waivers and other provisions in accordance with the Commission's Rules; and

The Secretary of the Commission having thereafter, in accordance with Section 3.25(c) of its Rules, withdrawn this matter from adjudication as to Aurora Chrysler-Plymouth, Inc.; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days; now, in further conformity with the procedure prescribed in Section 3.25(5) of its Rules, the Commission makes the following jurisdictional findings and enters the following order:

1. Respondent Aurora Chrysler-Plymouth, Inc. is a Delaware corporation with its principal place of business at 13733 Aurora Ave. North, Seattle, Washington.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as to Aurora Chrysler-Plymouth, Inc., and of said respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Aurora Chrysler-Plymouth, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, and any corporation, subsidiary, division or

device through which they act directly or indirectly, shall forthwith (A) adopt and adhere to the "Repossessed Vehicle Surplus/Deficiency" system established by Chrysler Corporation pursuant to the disposition of Docket 9072 as to Chrysler Corporation, and (B) deliver a copy of the Repossessed Vehicle Surplus/Deficiency system to all appropriate supervisory personnel.

II.

It is further ordered, That respondent shall, no later than 60 days after service of this Order:

A. Establish to the reasonable satisfaction of the Commission that (1) all surpluses generated from repossessed vehicles returned to respondent between February 10, 1973 and the date of service of this Order have been paid, and (2) for each such surplus, corrected information has been provided to any credit reporting agency to which respondent had previously reported the existence of a deficiency.

B. File with the Commission a written report setting forth in detail the manner and form in which respondent has complied with this Order.

III.

It is further ordered, That respondent notify the Commission at least 30 days prior to any dissolution or other proposed change in the corporate respondent (such as assignment or sale resulting in the emergence of a successor corporation or corporations), or any other corporate change (including the creation or dissolution of subsidiaries) which may affect compliance obligations arising out of this Order.

IN THE MATTER OF

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, ET AL.

Docket 9000. Interlocutory Order, Jan. 21, 1981

Granting complaint counsel leave to withdraw and dismissing "Motion for Disciplinary Action."

ORDER

On October 15, 1980, complaint counsel in this matter filed a "Motion For Disciplinary Action," asking that the Commission take "appropriate steps" against respondent's counsel for allegedly improper conduct. They asked the Commission to direct Administrative Law Judge Miles J. Brown to make certain findings under Rule of Practice 4.1(e) in a show cause hearing, and they asked the Commission to defer any disciplinary action until it had the results of the ALJ's investigation. The ALJ earlier denied complaint counsel's motion that he conduct such a hearing.

Very briefly, the subject of the requested investigation and the alleged cause for disciplinary action is a sequence of events over the course of discovery in this matter from 1976 to 1980. Those events, described in some detail in the pleadings, generated questions by complaint counsel about a) the thoroughness of respondent's search for and production of documents responsive to a 1976 subpoena and b) the duty of respondent and its counsel to supplement that subpoena response with additional material that was either newly discovered or, as suggested, intentionally withheld.

On December 1, 1980, respondent's counsel filed their "Opposition," accompanied by an affidavit. They denied that there was any improper conduct or any basis for disciplinary action, and they explained the questioned circumstances in detail. They also indicated that they had been engaged in extensive discussions with Bureau of Competition attorneys since the October 15 motion was filed and that the information they had provided would lead complaint counsel to withdraw their motion for disciplinary action. Still, respondent's counsel alleged that charges contained in the motion were made without adequate investigation, that they were incorrect, and that they had received damaging publicity. Therefore, respondent's counsel request that the Commission issue a press release stating its reasons for dismissing complaint counsel's motion.

As respondent's counsel indicated, on December 1, 1980, complaint counsel filed a "Reply" to the "Opposition" in which they withdrew

their request for a hearing and their request for disciplinary action. In so doing, however, complaint counsel recommended that the Commission consider and adopt policy positions or rules regarding certain enumerated discovery issues. Furthermore, complaint counsel state that the matter before us is not mooted by their withdrawal, since there are still unfulfilled discovery duties incumbent upon respondent and its counsel.

A brief, general outline of the salient facts described in the pleadings is necessary. In 1974, the respondent produced certain documents in private litigation, some of which later appeared to relate to the same subject matter as an FTC subpoena. In 1976, respondent produced further documents in response to an FTC subpoena, *not* including at least one relevant document believed to have surfaced in the 1974 private litigation. Thus, this controversy concerned pre-existing documents responsive to the 1976 subpoena, not discovered in 1976 and only later discovered (in subsequent phases of the private discovery) and thereupon produced to the Commission. There is no question that respondent's counsel did come forward with the lately discovered information, although there were questions about the timing of that production, which have been resolved. Furthermore, a subsequent Commission subpoena in 1979 yielded other documents said to be responsive to the 1976 subpoena which existed in 1976 but were not previously discovered or produced.

While questions of ethical conduct arising from this sequence of events are no longer before us, complaint counsel separately assert that respondent had a continuing obligation after 1976 to go back to various document sources, including the document production in the private litigation, in order to search for and produce documents responsive to the 1976 subpoena. In fact, complaint counsel claim that respondent's counsel have still not searched the contents of twelve boxes of Continental Baking Company documents which are duplicates of those produced in the private litigation and likely to contain responsive documents. We note that, despite claims of prejudice to complaint counsel's case, the ALJ has reopened the record to allow introduction of the lately discovered and produced documents. Therefore, with complaint counsel's withdrawal of the request for Commission disciplinary action, complaint counsel's residual concern focuses on the lack of an analog to Federal Rules of Civil Procedure 26(e) in the Commission's Rules of Practice and the ambiguity of responsibility thus created.

Rule 26(e), FRCP, imposes upon parties and their lawyers a duty to amend a prior discovery response if they obtain new information

that indicates 1) that the response was incorrect when made or 2) that the response was correct when made but is no longer true *and* that failing to amend the response would be a knowing concealment. Complaint counsel contend that the duty to supplement prior responses to Commission discovery orders includes 1) the obligation to submit documents that were responsive to a prior discovery order and in the custody, control or knowledge of the party at the time production was made but that were not furnished at that time, as well as 2) the obligation to produce, under certain circumstances, newly acquired information or documents. They say that the lack of a Rule 26(e) analog in the Commission's Rules of Practice makes this duty ambiguous. Consequently, complaint counsel, in withdrawing their motion, recommend that the Commission "consider" certain enumerated issues arising from this ambiguity. Furthermore, they recommend that the Commission adopt certain policies regarding the duty to supplement prior discovery responses, by which we assume that complaint counsel recommend promulgation of corresponding changes in our Rules of Practice.

Our response must necessarily be limited, for contrary to complaint counsel's suggestion, we regard the instant controversy as moot with the withdrawal of the motion for disciplinary action, which we allow. As for complaint counsel's request that respondent's counsel search through the twelve boxes of documents assembled for the private litigation to find pre-existing documents responsive to the 1976 subpoena, we believe that this matter should be left to the administrative law judge. In fact, the matters suggested by complaint counsel as the subjects of specific rules changes, such as entitlement to a subsequent discovery order when there is reason to believe that documents responsive to a prior order have not been produced, are matters presently reposed in the authority and discretion of the administrative law judges. See Rules of Practice Section 3.38.

As for the recommendation that the Commission "consider" certain discovery-related issues, because of the mootness of the specific request before us, we decline the opportunity to discuss generally any reasons for or effects of the absence of an express analog to FRCP 26(e) in our Rules of Practice. Therefore,

It is hereby ordered, That we grant complaint counsel leave to withdraw, and we hereby dismiss the October 15, 1980, "Motion For Disciplinary Action." Accordingly, the requests for Commission action and the specific questions of ethical conduct raised therein are rendered moot. We think that the press release requested by respondent's counsel is unnecessary.

IN THE MATTER OF

E.I. DUPONT de NEMOURS & CO.

Docket 9108. Interlocutory Order, Jan. 21, 1981

ORDER EXTENDING IN CAMERA TREATMENT

On January 16, 1980, E.I. DuPont de Nemours and Company ("DuPont") requested a three year extension of *in camera* treatment for certain documents in the record of this proceeding. By order of October 20, 1980, the Commission ordered that *in camera* protection of all documents so designated should continue until certain questions on which the Commission requested additional information are resolved. Respondent has submitted its response to that order and the Commission is now prepared to rule on the requested extension.

The Commission's standards for *in camera* protection of exhibits in adjudicative proceedings are clearly expressed in *H.P. Hood & Sons, Inc.,* 58 F.T.C. 1184 (1961); *Bristol-Myers Company,* 90 F.T.C. 455 (1977); and *General Foods Corporation,* Docket No. 9085, Order of March 10, 1980. Despite respondent's arguments to the contrary, the provisions of the F.T.C. Improvements Act of 1980 (Pub Law 96-252) governing treatment of confidential information do not alter the long-established fact that Section 6(f) of the Federal Trade Commission Act does not absolutely bar disclosure of business data as evidence in our adjudicatory proceedings.[1]

The standard for *in camera* treatment is one of "clearly defined, serious injury." *H.P. Hood & Sons, Inc.,* 58 F.T.C. at 1188. We pointed out in *Bristol-Myers Co.,* 90 F.T.C. at 457 and in our March 10 Order in *General Foods* that the secrecy and materiality of the business information sought to be protected comprise the two elements of the serious injury analysis. As aids in the determination of secrecy and materiality, the Commission in *Bristol-Myers* cited six factors mentioned in the Restatement of Torts. 90 F.T.C. at 457. Furthermore, we have acknowledged that the showing of serious injury does not necessarily require a specific demonstration of the manner in which other firms would use material to the disadvantage of the firm

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[1] New Section 21(d)(2) of the FTC Act provides that

> [a]ny disclosure of relevant and material information in adjudicative proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings . . . except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section.

Discussing what ultimately was enacted as Section 21(d)(2), the Senate Report on S.1991 stated specifically that the Commission should maintain the procedures in Rules 1.18(b) and 3.45 for granting *in camera* treatment. Senate Report No. 96-500 at pp. 27-28 (1979).

whose information is at issue. Rather, we have said that it is proper to infer, without a specific showing of how a competitor would use it, that disclosure of allegedly sensitive information would seriously affect the firm's commercial position.[2] Underlying this analysis is a general concern for the seriousness of injury to a firm's commercial or competitive position. Of course, the injury contemplated in *Hood* and its successors is not limited to "commercial" injury in any strict or exclusive sense, nor is such injury confined to the precise type under consideration in *Hood,* but our precedents appear to distinguish it from the kind of injury arising from potential tax liability envisioned by respondent.

In essence, respondent argues that certain earnings data should be given extended *in camera* treatment because of the possibility that disclosure would result in increased tax liability for the firm. In *Hood,* the Commission weighed the possibility that disclosed data might give rise to and be used in private treble-damage actions, and it concluded that such an eventuality was not the kind of injury that should govern its determination of whether to disclose the information. As such, it appears that respondent's potential tax liability is more like the potential private damage liability in *Hood* and less like the type of direct business injury contemplated by our *in camera* standards. Nevertheless, it is unnecessary for us to make a definitive determination on this point inasmuch as respondent advances an independent, and we think valid, ground for continued *in camera* treatment of the same information to which its tax argument applies.

The exhibits in question contain valuable, secret and material investment, earnings, profit, operative return and cost information about respondent's titanium dioxide and pigments business, the release of which might enable DuPont's competitors to construct an accurate financial model of DuPont's business, to its detriment. While it appeared to the Commission that certain information in question had been previously disclosed in public exhibits, respondent points out that the *in camera* data in question are *actual* while the previously disclosed data were only projections and forecasts. DuPont asserts, and we are persuaded, that the actual data were expensive to compile, are more sensitive and secret than the projections and are more likely to result in injury to respondent's business if released.

The Commission also asked DuPont for clarification of the status of certain *in camera* information that appeared to be too old to be of

[2] General Foods Corporation, Docket No. 9085, Order of August 1, 1980, pp. 1–2.

competitive concern. Respondent has persuaded us that, despite its age (1975), the actual data in question—trends of profits, earnings, unit costs and sales volumes of titanium dioxide—might enable competitors to extrapolate an accurate model of its current business. We also asked for further argument concerning certain comparisons of costs of production by plant. DuPont asserts that this information is more recent, more detailed and more accurate than similar information apparently disclosed in other exhibits and that this information is highly proprietary and sensitive, having been developed at substantial expense to DuPont. The Commission finds this a sufficient ground for extending *in camera* protection for the plant data. Finally, the Commission inquired about certain lists of prices for 1976, 1977 and 1978. Respondent contends that these exhibits contain indexed averages of actual discounted prices which are secret and which would assist its competitors if released. We are persuaded that this group of documents should also be given continued *in camera* treatment.

Having disposed of the specific groups of documents discussed in our October 20 Order, we now move to the whole *in camera* record of this proceeding. We have found it unnecessary to disclose any of the *in camera* information in writing our opinion in this case, which is a primary consideration in determining whether to grant *in camera* treatment to adjudicative information or to disclose it, 58 F.T.C. at 1187. Moreover, we have carefully reviewed each of the documents for which respondent seeks extended *in camera* treatment and are satisfied that all of them meet the criteria set out in the holdings cited above. Therefore,

It is ordered, That all exhibits presently in the *in camera* record of Docket No. 9108 shall remain *in camera* for three years from the date of this order, at which time respondent may show cause why those documents should not be made public.

IN THE MATTER OF

THE CENTRAL FLORIDA ELECTRICAL BID DEPOSITORY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9132. Complaint, Nov. 28, 1979—Decision, Jan. 22, 1981

This consent order requires, among other things, a Winter Park, Fla. corporation operating a non-profit electrical bid depository service, and nine individuals to cease engaging in any course of action, conspiracy or agreement which has the purpose or effect of fixing, maintaining, stabilizing, or tampering with the price of electrical contracting services, including: encouraging or requiring members or signatories to exchange relevant bid information prior to bid opening time; barring them from negotiating or submitting bids after the bid filing deadline; requiring them to function exclusively through the bid depository; and penalizing those who fail to do so. Further previously suspended recalcitrants must be reinstated, and the corporation is required to promptly amend its rules and regulations so as to conform with the terms of the order.

Appearances

For the Commission: *Truett M. Honeycutt* and *David R. Flowerree.*

For the respondent: *William A. Harmening, Stanley, Harmening, Lovett & Cohen,* Orlando, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Central Florida Electrical Bid Depository, Inc., a corporation, and David Perry, Robert Behe, Larry Poirier, and Fred Newton, individually and as officers and directors of said corporation, and Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly, and Lynn Harden, individually and as directors of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. DEFINITIONS

1. For the purposes of this complaint the term "*bid filing deadline*" shall mean the time set by The Central Florida Electrical Bid Depository, Inc., for the receipt by the depository of final bids from electrical contractors to general contractors for a specific job.

2. For the purposes of this complaint the term "*bid shopping*" shall mean the practice of a general contractor seeking to obtain an offer, after the bid filing deadline but either before or after the award of the prime contract, from an electrical contractor to perform work at a price lower than that submitted by that electrical contractor or another electrical contractor bidding through The Central Florida Electrical Bid Depository, Inc.

3. For the purposes of this complaint the term "*bid peddling*" shall mean the practice of an electrical contractor offering, after the bid filing deadline but either before or after the award of the prime contract, to perform work at a price lower than that submitted by himself or another electrical contractor bidding through The Central Florida Electrical Bid Depository, Inc.

II. PARTIES

PAR. 1. Respondent The Central Florida Electrical Bid Depository, Inc., (hereinafter sometimes referred to as corporate respondent, or CFEBD) is a nonprofit corporation, organized and existing under the laws of the State of Florida, with its principal office and place of business located at 707 Nicolet Ave., Winter Park, Florida.

Respondents David Perry, Robert Behe, Larry Poirier and Fred Newton are the officers and directors of the corporate respondent, and Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly, and Lynn Harden are directors of said corporation (hereinafter sometimes referred to as individual respondents). They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondent CFEBD was organized for, and serves its members and users as, an instrumentality which promotes cooperative activity among member and user contractors, collects business data from such contractors, and generally purports to assist them in the operation of their businesses. One of the functions of respondent CFEBD is the operation of a bid depository. Said respondent CFEBD's members and users represent a substantial, if not dominant, part of the construction industry contractors in the central area of the State of Florida.

For the purposes of this complaint, the members and users of the bid depository operated by respondent CFEBD consist of two groups: "participating members" (hereinafter sometimes referred to as "members") and "signatories to the depository" (hereinafter sometimes referred to as "signatories"). The members group is composed of electrical contractors who perform their electrical contracting services principally in Flagler, Volusia, Lake, Seminole, Orange, Osceola and Brevard Counties, Florida. The signatory group is composed of general contractors who wish to avail themselves of the bid depository service offered by respondent CFEBD as hereinafter described and for that purpose become signatories to such service.

III. COMMERCE

PAR. 3. Respondents maintain, and have maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

IV. COUNTS

A. Price-Fixing

PAR. 4. Since at least 1976, respondent CFEBD, individual respondents, and the signatories to and members of its bid depository have agreed to engage, and have engaged, in unfair and unlawful acts, policies and practices, the purpose or effect of which is, or may be, to fix, maintain, raise, stabilize or otherwise tamper with prices and thereby unlawfully hinder, restrain or destroy competition in the providing of electrical and general contracting services related to building construction in or affecting commerce.

Pursuant to, and in furtherance of, said agreement, respondents have engaged in the following acts, policies and practices, among others:

(1) Prohibiting, in the rules and regulations of the CFEBD, any electrical contractor from engaging in bid peddling or from otherwise submitting bids to general contractors using the services of the depository unless such bids were deposited with the depository in accordance with the rule regarding the bid filing deadline.

(2) Prohibiting, in the rules and regulations of the CFEBD, any general contractor using the services of the depository from engaging in bid shopping or from otherwise submitting a bid to an awarding authority unless such bid uses the price for electrical contracting

services which was chosen from those bids filed with the depository in accordance with the rule regarding the bid filing deadline.

(3) Facilitating, as part of the aforesaid agreement, the restraint on bid shopping and bid peddling or facilitating, fixing, raising, stabilizing or otherwise tampering with prices by:

(a) Providing in the rules and regulations of CFEBD for the exchange, among member electrical contractors, prior to the bid filing deadline, of the names of those member electrical contractors who express their intent to bid on a project for which bids will be received through the bid depository.

(b) Encouraging in the rules and regulations of CFEBD that electrical contractors who are members of the depository register with the depository any jobs which are the subject of negotiation between such electrical contractors and general contractors and providing that all parties so registering shall be provided with the names of those previously or subsequently registering for a specific job.

(c) Providing in the rules and regulations of the CFEBD that any job which has been registered by two or more electrical contractors is automatically required to be bid through the bid depository.

B. Group Boycott

PAR. 5. Since at least 1976, respondent CFEBD, individual respondents, and the signatories to and members of its bid depository have agreed to engage, and have engaged, in unfair and unlawful acts, policies and practices, the purpose or effect of which is, or may be, to create and perpetuate a group boycott or concerted refusal to deal which unlawfully hinders, restrains, or destroys competition among companies providing electrical and general contracting services related to building construction in or affecting commerce.

Pursuant to and in furtherance of said agreement, respondents have engaged in the following acts, policies and practices, among others:

(1) Providing a bid service or depository in which participating members and signatories of said respondent corporation agree, with respect to any specific job for which they use the depository, to function exclusively through the aforesaid bid depository.

In particular, on any specific job which an electrical contractor participates in the respondents' bid depository program, the electrical contractor may not accept a contract for that particular job from

any general contractor who did not participate in the bid depository on that same job.

(2) Facilitating, as part of the aforesaid agreement, a group boycott or concerted refusal to deal by:

(a) Threatening directly or indirectly suspension from participation in the bid depository of:

(i) Any member electrical contractor for submitting bids to general contractors in violation of said bid depository rules and regulations; and,

(ii) Any signatory general contractor for awarding a contract based upon bids received in violation of bid depository rules and regulations from electrical contractors who have not submitted bids through said bid depository.

(b) Providing in the rules and regulations of CFEBD for the circulation of the name of any member or signatory suspended from use of the respondents' bid depository among the members and signatories of the CFEBD.

V. VIOLATIONS

PAR. 6. The aforesaid acts and practices of respondents have been and are now having the effect of hampering and restraining competition in providing electrical and general contracting services, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules, and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The Central Florida Electrical Bid Depository, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 707 Nicolet Ave., in the City of Winter Park, State of Florida.

2. Respondents David Perry, Robert Behe, Larry Poirier, and Fred Newton are officers and directors of said corporation. Respondents Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly and Lynn Harden are directors of said corporation. Their address is the same as that of said corporation.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

It is ordered, That respondents The Central Florida Electrical Bid Depository, Inc., a corporation, its successors and assigns, the officers and directors, David Perry, Robert Behe, Larry Poirier, and Fred Newton, individually and as officers and directors of said corporation, and Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly, and Lynn Harden, individually and as directors of said corporation, and respondents' agents, representatives and employees, directly or indirectly, or through any corporate or other device, or through any member of or signatory to its bid depository, in connection with the receipt, solicitation, use, submission or transmission of bids or estimates which are, or may be, employed in the awarding of building construction contracts and subcontracts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from

entering into, continuing, cooperating in, or carrying out, any course of action, conspiracy, undertaking or agreement:

(1) Which requires or provides that electrical contractors using the services of a depository are prohibited from (a) negotiating, after the deadline for the filing or deposit of bids with the depository, with general contractors using the services of the depository; or (b) submitting further bids to such general contractors after the deadline for the filing or deposit of bids with the depository; or (c) accepting a contract at a price other than the price submitted by such electrical contractors through the depository prior to the deadline for the filing or deposit of bids;

(2) Which requires or provides that general contractors using the services of a bid depository are prohibited from (a) negotiating, after the deadline for the filing or deposit of bids with the depository, with electrical contractors using the services of the depository; or (b) attempting to obtain or obtaining further offers to perform jobs for which bids were taken through the depository; or (c) awarding contracts to electrical contractors at prices other than those submitted through the depository prior to the deadline for the filing or deposit of bids;

(3) Which requires or encourages the exchange, prior to bid opening time, among member electrical contractors of the names, addresses or other identifying information with respect to those member electrical contractors who register or otherwise express their intent to bid on a project, or provides for the disclosure to any member or participant in the depository of the name, address, or other identifying information with respect to any subcontractor who expresses an intent to bid and requests confidentiality for such information prior to the opening of bids by those companies, firms, or individuals to whom bids are submitted;

(4) Which encourages, provides for or requires the registration of or exchange of information among member electrical contractors with respect to any job which is the subject of negotiation between member electrical contractors and companies, firms, or individuals engaged in general contracting;

(5) Which requires or provides that any work which is the subject of negotiation between any general contractor and one or more electrical contractors and has been registered by two or more electrical contractors is automatically required to bid through a depository;

(6) Which requires or provides that any member, signatory, company, firm or individual that uses a bid depository operated by

one or more of the respondents with respect to any specific job shall receive or solicit bids from, or submit bids to, only those companies, firms or individuals that are using the services of the depository with respect to that job;

(7) (a) Which subjects any member, signatory, company, firm or individual using a bid depository to submit bids in connection with any specific job, to suspension from the use of the bid depository or to a fine, penalty or any other sanction, or threat of sanction, for submitting any bid to any company, firm or individual that is not a member of or signatory to the bid depository or that is not using the bid depository with respect to that job;

(b) Which subjects any member, signatory, company, firm or individual using a bid depository to solicit or receive any bids in connection with any specific job, to suspension from the use of the bid depository or to a fine, penalty or any other sanction, or threat of sanction, for soliciting or receiving any bid from any company, firm, or individual that is not a member of or signatory to the bid depository or is not using the bid depository with respect to that job; or,

(c) Which subjects any member, signatory, company, firm, or individual using a bid depository to solicit or receive any bids in connection with any specific job, to suspension from the use of the bid depository or to a fine, penalty or any other sanction, or threat thereof, for awarding any contract based upon any bid received from any company, firm or individual that did not use the bid depository with respect to that job;

(8) Which requires or provides that any member, signatory, company, firm, or individual that in any fashion uses a bid depository operated by one or more of the respondents shall receive or solicit bids from, or submit bids to, only those companies, firms, or individuals that are also members, signatories or participants in said bid depository;

(9) (a) Which suspends from participation in a bid depository, or fines or imposes any other sanction or threat of sanction upon any member, signatory, company, firm, or individual that submits any bid in any fashion to any company, firm, or individual that is not a member of or signatory to said bid depository, or that does not employ or use said bid depository.

(b) Which suspends from participation in a bid depository, or fines or imposes any other sanction or threat of sanction upon any member, signatory, company, firm, or individual that receives or solicits any bid in any fashion from any company, firm, or individual

that is not a member of or signatory to said bid depository, or that does not employ or use said bid depository;

(c) Which suspends from participation in a bid depository, or fines or imposes any other sanction or threat of sanction upon any member, signatory, company, firm, or individual for awarding any contract based upon any bid received from any company, firm, or individual that is not a member of or signatory to said bid depository or that does not employ or use said bid depository in connection with the particular job for which the contract was awarded; or,

(10) Which requires or provides for the circulation of any notice that any member or signatory of a bid depository operated by one or more of the respondents shall be, or has been, suspended or otherwise disciplined for violation of the rules and regulations of the bid depository;

(11) Which has the purpose or effect of fixing, maintaining, stabilizing, or tampering with the price of electrical contracting services.

It is further ordered, That respondents shall immediately reinstate any company, firm, or individual suspended from participation in said depository, which suspension resulted from conduct engaged in by respondents, which hereafter would amount to a violation of this order.

It is further ordered, That respondents shall promptly amend the rules and regulations of the corporate respondent and all documents used by the corporate respondent in the operation of its bid depository so that such rules, regulations and documents are consistent with the terms of this order.

It is further ordered, That each individual respondent named herein promptly notify the Commission at such time as he may discontinue his affiliation with the corporate respondent, its successors or assigns. In addition, each individual respondent shall for a period of fifteen (15) years after the date of service of this order promptly notify the Commission of each new affiliation of himself as officer, director, employee or consultant with any corporation or association whose activities include the operation of a bid depository. Such notice shall include the respondent's business address at such corporation or association and a statement of the nature of the affiliation, as well as a description of the respondent's duties and responsibilities in connection with said affiliation.

It is further ordered, That respondent corporation shall within fifteen (15) days of the service of this order distribute a copy of this order to all individuals who are employees, officers and directors as

of the time of service of this order and to all members, signatories, companies, firms, or individuals that have participated in said bid depository at any time prior to service of this order. Furthermore, respondent corporation shall within fifteen (15) days of the date that individuals, companies, or firms become affiliated with, or commence participation in such bid depository, its successors or assigns, distribute a copy of this order to all such new employees, officers and directors who become affiliated with the bid depository, its successors or assigns, and to all such new members, signatories, companies, firms, or individuals that begin participation in the bid depository, its successors or assigns.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order or at least thirty (30) days prior to the formation by or with the participation of any respondent of any other corporation or organization which conducts the business of a bid depository.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

In the Matter of

MOBIL OIL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3054. Complaint, Jan. 22, 1981—Decision, Jan. 22, 1981

This consent order requires, among other things, a New York City manufacturer of chemical, fuel and lubrication products to cease representing in the advertising, labeling and sale of "Mobil 1" that its use in automobiles will reduce the consumption of engine lubricating oil, unless, in conjunction with such representation, respondent sets forth a prescribed statement advising new users of the product to check the oil level of their cars frequently because some cars will experience higher oil consumption with low viscosity oils like Mobil 1.

Appearances

For the Commission: *Joseph L. Hickman, John McNally* and *Sam Carusi.*

For the respondent: *John McGrath, Donovan, Leisure, Newton & Irvine,* Washington, D.C., and *Susan Csia* and *John McConnin,* in-house counsel.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mobil Oil Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Mobil Oil Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 150 East 42nd St., New York, New York.

Par. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, sale and distribution of various fuel, chemical and lubrication products throughout the United States for use by industry and by the general public.

Par. 3. For several years last past, respondent has manufactured, and has sold and distributed to the general public through automo-

bile service stations and other retailers throughout the United States a synthesized automotive lubricant under the trade name: "Mobil 1".

PAR. 4. Respondent causes Mobil 1 to be transported from various places of manufacture, storage and distribution in various States of the United States to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times material herein has maintained, a substantial course of trade in said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. At all times material herein, respondent has been, and is, in substantial competition in or affecting commerce, with individuals, firms and corporations engaged in the sale and distribution of automotive lubricants for use by the general public.

PAR. 6. In the course and conduct of its business, and for the purpose of inducing the sale of Mobil 1, respondent disseminates, and causes the dissemination of advertising by various means, including those in national publications and brochures distributed by the mail across state lines, point of sale promotional materials displayed or distributed in automobile service stations and in other retail stores throughout the United States, statements on Mobil 1 labels, and through television broadcasts transmitted by television stations located in various states of the United States which broadcast within said states and across state lines.

PAR. 7. Typical statements in such advertising include, but are not limited to, "Reduces oil consumption up to 25% in engines in good mechanical condition," "Reduces oil consumption in engines in good mechanical condition," and ". . . Mobil 1 saves . . . up to 25% on oil consumption in engines in good mechanical condition."

PAR. 8. By and through its advertisements, respondent represents, directly or indirectly, that by switching from conventional mineral oils to Mobil 1 purchasers will achieve in cars with engines in good mechanical condition a substantial reduction in the amount of engine lubricating oil consumed in the operation of such cars.

PAR. 9. In truth and in fact, many purchasers of Mobil 1, by switching from a heavier viscosity conventional mineral oil, will not achieve a substantial reduction in the amount of oil consumed in the operation of their cars. To the contrary, the use of Mobil 1 may result in increased oil consumption in various types or categories of cars, including certain older or higher mileage cars, high performance cars, and cars with rebuilt or rebored engines, which, because of larger engine clearances, consume less oil of a heavier viscosity than they consume when Mobil 1 is used.

PAR. 10. In the advertisements described in Paragraph Six,

respondent fails to disclose that some types of vehicles will experience increased oil consumption with the use of low viscosity oils such as Mobil 1. Therefore, respondent's advertisements and representations described in Paragraphs Six and Eight, were and are unfair and deceptive.

PAR. 11. The use by respondent of the aforesaid unfair and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products and services by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts or practices and unfair methods of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent

agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Mobil Oil is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 150 East 42nd St., in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I

It is ordered, That respondent Mobil Oil Corporation, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of Mobil 1 in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or indirectly, that use of such product results in reduced consumption of engine lubricating oil unless there is set forth, and in immediate conjunction with such representation, the following disclosure:

NEW USERS OF [NAME OF PRODUCT] SHOULD CHECK OIL LEVELS MORE FREQUENTLY. SOME CARS WILL EXPERIENCE HIGHER OIL CONSUMPTION WITH LOW VISCOSITY OILS LIKE [NAME OF PRODUCT].

Provided however, such disclosure shall not be required if (1) the representation concerns only vehicles which are not general purpose passenger automobiles and (2) the representations do not appear in media primarily directed to individual consumers.

II

It is further ordered, That the disclosures covered by Paragraph I above:

1. If in print media, it shall be set forth clearly and conspicuously

and shall be separated from the principal portion of the text of the advertisement so it can be readily noticed.

2. If on labels or packaging materials, shall be parallel to the base of the label or package and the letters must be easily readable.

III

It is further ordered, That if the disclosure required by Paragraph I above is made in:

1. Radio advertising, the duration of the disclosure will be at least eight (8) seconds.

2. Television advertising, the disclosure may be in either audio or visual form; the duration of the disclosure will be at least eight (8) seconds.

3. Visual form in television advertising, each word shall be in letters of color or shade which contrasts with the principal background against which it is displayed with letters that are easily readable and without distracting noise or action in the background.

IV

It is further ordered, That the provisions of this Order shall apply only to representations disseminated within the United States, any of its territories or the District of Columbia.

V

For purposes of this Order,

"*Mobil 1*" shall mean any SAE 5W-20 synthetic motor oil manufactured or distributed by Mobil for use in the engines of general purpose passenger automobiles.

"*General purpose passenger automobile*" shall mean any automobile or light truck owned by individual consumers and principally used for personal transportation. It does not include commercial or rental fleets of automobiles or trucks, heavy or medium weight trucks, or trucks or automobiles primarily used for commercial purposes.

VI

It is further ordered, That respondent shall notify the Commission at least 30 days prior to the effective date of any change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or

dissolution of any subsidiary, or any other change in the corporation which would affect compliance obligations arising out of this Order.

VII

It is further ordered, That the respondent shall forthwith distribute a copy of this Order to each of its operating divisions involved with the sale, distribution or advertising of Mobil 1 and to each of its officers, representatives and employees who are engaged in the preparation and placement of advertisements and creation of product labels for such product.

VIII

It is further ordered, That any change required in the labels, containers or packing material used with Mobil 1 will be deemed to be in compliance with this Order if such changes are made and used with all Mobil 1 which is packaged after six (6) months from the effective date of this Order.

IX

It is further ordered, That the respondent shall, within sixty (60) days after service upon them of this Order, file with the Commission a report, in writing, setting forth the manner and form in which it has complied with this Order.

In the Matter of

OWENS-CORNING FIBERGLAS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2842. Decision, Sept. 30, 1976—Modifying Order, Jan. 28, 1981

This order reopens the proceeding and modifies the Commission order issued on September 30, 1976 (41 FR 50811, 88 F.T.C. 465), by substituting for the order in its entirety, a modified order which retains the major requirements of the original order and provides that upon the effective date of the Commission's Trade Regulation Rule on Labeling and Advertising of Home Insulation (the Rule), any provision of the order which is inconsistent with a provision in the Rule be deemed automatically deleted. The order also provides for the reinstatement of the deleted provision, should the relevant provision of the Rule be rescinded, invalidated or amended.

Order Granting Request To Reopen the Proceeding and Modifying Order To Cease and Desist

Respondent, Owens-Corning Fiberglas Corporation, having requested, on July 15, 1980, that the Commission reopen the proceeding in Docket No. C-2842 for the purpose of modifying the Order to Cease and Desist entered in that matter; and

The Commission having placed such request, together with supporting documents attached thereto, upon the public record for a period of thirty (30) days, pursuant to Section 2.51 of its Rules; and

The Commission being of the opinion that the public interest would be served by such reopening of the proceedings;

Now therefore, it is ordered, That the proceeding in Docket No. C-2842 be, and it is hereby, reopened; and

It is further ordered, That the Order entered in Docket No. C-2842 be modified by substituting for the Order in its entirety the following Modified Order:

I

It is ordered, That respondent Owens-Corning Fiberglas Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly or through any corporation, subsidiary, division or other device, in connection with consumer advertising, offering for sale, sale, or distribution of fibrous glass insulation for residential buildings, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Directly or by implication misrepresenting in any advertising or sales promotion material, that respondent has a reasonable basis for statements or representations which are made concerning the amount of energy or money the consumer can save as a result of installing said insulation, or concerning any recommended level of insulation, including an R-value recommendation.

B. Directly or by implication making any statements or representations in any advertising or sales promotion material, concerning insulating characteristics of said insulation, concerning savings in money or energy which consumers can realize as a result of installing said insulation, or concerning any recommended level of insulation, including an R-value recommendation, unless at the time of such statements or representations respondent has a reasonable basis for such statements or representations.

Such reasonable basis shall consist of competent scientific, engineering, or other objective material, or industry-wide standards based on such material, or reliance upon governmental laws, regulations, orders, standards or recommendations; provided, however, that in the case of reliance on governmental laws, regulations, orders, standards or recommendations: (1) such laws, regulations, orders, standards or recommendations must have been finally adopted by the agency involved; (2) such laws, regulations, orders, standards, or recommendations must be applicable to the context of the advertisement or sales promotion material and must not render any portion of the advertisement or sales promotion material misleading; and (3) the agency promulgating such laws, regulations, orders, standards, or recommendations must be identified.

C. Directly or by implication misrepresenting, in any advertising or sales promotion material, the amount of energy or money which a consumer can save by installing said insulation, or by installing any recommended level of insulation, including any recommended R-value.

D. Directly or by implication misrepresenting, in any advertising or sales promotion material, the facts, conditions, and/or assumptions which form the basis for energy savings claims, money savings claims, or R-value recommendations.

E. Failing to disclose in advertising or sales promotion material containing money or energy savings claims, facts, conditions and/or assumptions which, within the confines of the medium being used, are significant to the consumer and which affect the amount of money and energy a consumer can save by installing said insulation or by installing any recommended level of insulation, including any

recommended R-value (*e.g.*, whether the savings claimed have taken into account the cost of the insulation and installation thereof).

II

It is further ordered, That any provision of this order that is inconsistent with any provision of the Commission's Trade Regulation Rule on Labeling and Advertising of Home Insulation (the Rule), as such provision is finally made effective, shall be deemed deleted to the extent of such inconsistency. This deletion shall be considered to have occurred on the date such provision of the Rule becomes effective. If such provision of the Rule shall be rescinded, invalidated or amended, the deleted provisions shall be automatically reinstated. Such reinstatement shall be considered to have occurred sixty (60) days after the date of the rescission, invalidation, or amendment.

III

It is further ordered, That respondent Owens-Corning Fiberglas Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with consumer advertising, offering for sale, sale, or distribution of fibrous glass insulation for residential buildings, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

A. Which consist of documentation in support of any claims included in advertising or sales promotion material, insofar as the text of such material is prepared or is authorized and approved by any person who is an officer or employee of respondent Owens-Corning Fiberglas Corporation, or of any division or subdivision of respondent, or by any advertising agency engaged by respondent or by any such division or subsidiary, which concern the insulating characteristics of said insulation or the savings which consumers can realize from the installation of said insulation or of any recommended level of insulation, including any recommended R-value; and

B. Which provided the basis upon which respondent relied as of the time those claims were made; and

C. Which shall be maintained by respondent for a period of three

(3) years from the date such advertising or sales promotion material was last disseminated.

IV

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions selling or distributing said insulation.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries engaged in the domestic sale or distribution of fibrous glass insulation for residential buildings, or any other change in the corporation which may affect compliance obligations arising out of the order.

VI

It is further ordered, That respondent herein shall file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, on the following dates:

A. Within sixty (60) days after service upon it of this order;
B. On July 1, 1981; and
C. On January 31, 1982.

In the Matter of

CHRYSLER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9072. Complaint, Feb. 10, 1976—Decision, Feb. 10, 1981*

This consent order requires, among other things, a Highland Park, Mich. motor vehicle manufacturer (Chrysler) and its Troy, Mich. credit corporation subsidiary (Chrysler Credit) to timely provide dealerships with a prescribed system, together with a standardized form, to be used in calculating and recording payment of surpluses realized on repossessed vehicles; and to make the "Repossessed Vehicle Surplus/Deficiency system" a part of Chrysler's Dealer Uniform Accounting System Manual. Respondents are required to conduct training programs designed to familiarize dealers with their obligations in handling repossessions; and follow up the programs with a series of audits to verify that surpluses are being correctly calculated and paid. The order further requires that Chrysler take specified measures with respect to repayment of surpluses realized by Chrysler-owned dealerships from May 1, 1974; send bulletins to dealers urging them to pay surpluses on vehicles returned to them by Chrysler Credit since May 1, 1974; and notify each customer whose vehicle is repossessed of the nature and duration of customer's rights to redemption or refund of surpluses. Additionally, Chrysler Credit is required to develop revised retail installment contract forms that include a clear, concise statement advising customers that in the event of repossession, they are entitled to a refund of any surplus realized from the resale of the vehicle.

Appearances

For the Commission: *Dean Fournier, Bruce D. Carter, Sharon S. Armstrong, David Bricklin* and *Stevan Phillips.*

For the respondents: *Clifford L. Johnson,* House Counsel, Chrysler Corporation, Detroit, Michigan, *A.L. Ronquillo,* House Counsel, Chrysler Credit Corporation, Troy, Michigan and *William A. Krohley, Kelley Drye & Warren,* New York City.

Decision and Order

The Commission having heretofore issued its complaint charging the above respondents* with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having

* Complaint previously published at 97 F.T.C. 107.

* In the original form of the complaint, Chrysler Motors Corporation was a named party and Chrysler Corporation was not. Upon advice that Chrysler Corporation had succeeded Chrysler Motors pursuant to a merger effective December 31, 1975, the complaint was amended by mutual consent on June 14, 1976 to substitute Chrysler Corporation as a party respondent in lieu of Chrysler Motors.

been served with a copy of that complaint together with a proposed form of order; and

Respondents Chrysler Corporation and Chrysler Credit Corporation, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, admissions by these respondents as to the Commission's jurisdiction, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions in accordance with the Commission's Rules; and

The Secretary of the Commission having thereafter, in accordance with Section 3.25(c) of its Rules, withdrawn this matter from adjudication as to Chrysler Corporation and Chrysler Credit Corporation; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed pursuant to Section 3.25(f) of its Rules; now, in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission makes the following jurisdictional findings and enters the following order:

1. Respondent Chrysler Corporation is a Delaware corporation with its office and principal place of business at 12000 Lynn Townsend Drive, Highland Park, Michigan.

2. Respondent Chrysler Credit Corporation is a Delaware Corporation with its office and principal place of business at 900 Tower Drive, Troy, Michigan.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as to Chrysler Corporation and Chrysler Credit Corporation, and of these respondents, and the proceeding is in the public interest.

Order

I.

It is ordered, That for purposes of this Order the following definitions shall apply:

A. "*Chrysler Respondents*" means Chrysler Corporation ("Chrysler") and Chrysler Credit Corporation ("Chrysler Credit"). It shall not refer to Aurora Chrysler-Plymouth, Inc. References to either or

both of the Chrysler respondents shall include their successors, assignees of any of their business operations subject to this Order, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or other forms of business organization through which they may act in the United States. *Provided, however,* that references to Chrysler shall not include Chrysler Credit, and references to Chrysler Credit shall not include Chrysler, and references to either or both of the Chrysler respondents shall not include Dealerships.

B. "*Vehicle*" means a passenger car or a truck with a gross Vehicle weight less than 26,000 pounds (11,794 kilograms).

C. "*Dealer*" or "*Dealership*" means a corporation, partnership or proprietorship that is a Chrysler, Plymouth or Dodge Vehicle Dealership pursuant to a Direct Dealer Agreement with Chrysler or any subsequent comparable agreement but excludes truck Dealerships whose principal business is the sale of trucks with a gross Vehicle weight of more than 8,000 pounds (3,629 kilograms).

D. "*Retail Sale*" means the installment credit sale of a Vehicle, other than for purposes of resale (*e.g.,* sale to Dealerships or wholesalers), lease or rental, to a purchaser who is not a fleet purchaser.

E. "*Repurchase Financing*" means the financing of a Retail Sale subject to an agreement between a finance company or institution and a Dealership (generally called a "repurchase," "recourse," or "guaranty" agreement) which provides that the Dealership is obligated to pay off the outstanding obligation to the finance company or institution after receiving a transfer of the repossessed Vehicle.

F. "*Repurchase Dealer*" or "*Repurchase Dealership*" means a Dealership that engages more than occasionally in Repurchase Financing transactions.

G. "*Equity Dealership*" means a Dealership in which Chrysler holds more than 50 percent of the voting stock or is entitled to elect more than 50 percent of the board of directors.

H. "*Liquidating Dealership*" means an Equity Dealership whose business has been or is being wound up by Chrysler or under Chrysler's supervision. It shall not mean a Dealership not previously an Equity Dealership whose assets come into the possession or control of either of the Chrysler Respondents by virtue of default on or compromise of a debt obligation.

I. "*Financing Customer*" means a purchaser of a Vehicle from a Dealership by means of a Retail Sale.

J. "*Disposition*" or "*Dispose*" refers to a Dealership's sale or

initial lease of a repossessed Vehicle previously sold by that Dealership and returned to it by or for a finance company or institution pursuant to a repurchase agreement. Such sale or lease includes only transactions with an independent third party; *i.e.,* it does not include a sale or lease to the finance company or institution, the Dealership or their representatives, or to a person or firm liable under a guaranty, endorsement, or repurchase agreement covering the repossessed Vehicle. Disposition or Dispose shall not refer to the repurchase of a repossessed Vehicle by a Dealership pursuant to a repurchase agreement, or refer to a sale subsequent to a judicial sale in Louisiana.

K. "*Proceeds*" means whatever is received upon Disposition in exchange for the repossessed Vehicle, but exclusive of sales taxes, service contracts or separately priced warranties.

L. "*Allowable Expenses*" means only actual out-of-pocket expenses incurred as the result of a repossession. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for Disposition and Disposing of the Vehicle, and not otherwise reimbursed to the Dealership. They are limited to the following charges (if allowable under applicable state law):

1. expenses paid to others, who are not employees of the Dealership or of the finance company or institution that financed the Vehicle, for repossessing, towing or transporting the Vehicle;

2. filing fees, court costs, cost of bonds, fees paid to a sheriff or similar officer, and fees and expenses paid to an attorney who is not an employee of the Dealership or the finance company or institution for obtaining possession of or title to the Vehicle;

3. fees paid to others to obtain title to the Vehicle, to obtain legally required inspection of the Vehicle, or to register the Vehicle;

4. expenses paid to others for storage (excluding a charge for storage at facilities operated by the Dealership);

5. labor and associated parts and supplies furnished by the Dealership for the repair, reconditioning or maintenance of the Vehicle in preparation for Disposition, computed at Dealership cost (as defined in the Initial Compliance Report);

6. amounts paid to others for labor and associated parts and supplies purchased for the repair, reconditioning or maintenance of the Vehicle in preparation for Disposition;

7. cost of sales commissions paid for actual participation in the Disposition of the particular Vehicle, computed at a rate no higher than for a similar nonrepossessed Vehicle and excluding portions of

commissions attributable to the selling of service contracts, separately priced warranties, financing or insurance;

8. expenses of advertisements that specifically mention the particular Vehicle, including a proportional share of any advertisement that also mentions other Vehicles;

9. auctioneer expenses and fees paid;

10. amounts paid to others for communication (including telephone calls, postage, and military locator fees) and photocopying necessary in arranging for the repossession, holding, transportation, reconditioning and Disposition of the Vehicle; and

11. amounts paid to insure the particular Vehicle while holding it.

M. "*Contract Balance*" means (1) the unpaid balance as of the date of repossession less unearned finance charge and insurance premium rebates deducted by the finance company or institution, plus (2) other charges authorized by contract or law and actually assessed or incurred prior to repossession.

N. "*Surplus*" means the excess of (1) the Proceeds plus applicable insurance or warranty reimbursements received by the Dealership or finance company or institution plus any other applicable rebates or credits not deducted by the finance company or institution, over (2) the Contract Balance, Allowable Expenses, and amounts paid to discharge any security interest provided for by law.

O. "*Pay*" or "*Paid,*" in reference to payment of a Surplus, means a reasonable attempt to pay in accordance with the standards set forth in the Initial Compliance Report.

II.

It is further ordered, That Chrysler shall provide to all existing Dealerships within sixty (60) days of the effective date of this Order, and to each new Dealership within thirty (30) days of entering into a Direct Dealer Agreement, a system for determining the existence of Surpluses and for accounting for Surpluses and for any deficiencies sought (hereinafter the "Repossessed Vehicle Surplus/Deficiency system").

A. The Direct Dealer Agreements presently in effect between Chrysler and Dealerships provide that the Dealership "will use and keep accurate and current at all times a uniform accounting system and will follow accounting practices, both satisfactory to Chrysler". Chrysler shall make the Repossessed Vehicle Surplus/Deficiency system part of the uniform accounting system and accounting practices referred to in the Direct Dealer Agreements and any

subsequent comparable agreements. So long as the Direct Dealer Agreements or subsequent comparable agreements remain in effect, Chrysler shall not change them so as to affect the status of the Repossessed Vehicle Surplus/Deficiency system without sixty (60) days notice to the Commission and shall not change those agreements so as to affect the status of the Repossessed Vehicle Surplus/Deficiency system if the Commission, within that time period, advises Chrysler that it objects to the change.

B. The Repossessed Vehicle Surplus/Deficiency system shall include a standardized form ("Record of Repossessed Vehicle Sale") for Dealerships' use in determining the existence and amount of Surpluses and of any deficiencies sought, and in recording payment of each Surplus in accordance with the provisions of Paragraph II.C below.

C. The Repossessed Vehicle Surplus/Deficiency system shall contain provisions that:

1. Each Surplus is to be determined according to Paragraphs I.J through I.N of this Order and Paid to the defaulting customer within forty-five (45) days of Disposition.

2. Expenses other than Allowable Expenses are not to be deducted in calculating Surpluses and deficiencies sought.

3. Dispositions are to be commercially reasonable, which in practice means that the Dealership should make the same efforts to Dispose of the repossessed Vehicle at the best available price as would be made for a comparable used Vehicle except that a Dealership is not required to offer a warranty without extra charge even though such warranties are provided on other used Vehicles.

4. If any rebate owing to the defaulting customer's account has not been received at the time the Record of Repossessed Vehicle Sale is completed, such rebate is to be applied for promptly.

5. If any rebate is received after completion of the Record of Repossessed Vehicle Sale, any Surplus or deficiency sought is to be redetermined, a new or amended Record of Repossessed Vehicle Sale is to be prepared, and any remaining Surplus Paid within forty-five (45) days of Disposition or within ten (10) days of receiving the rebate, whichever is later.

6. The Record of Repossessed Vehicle Sale is to be prepared by the Dealership for each Disposition of a repossessed Vehicle and:

a. is to set forth the calculation of each Surplus, and of each deficiency sought;

b. is to be certified by a person authorized to sign retail installment contracts on behalf of the Dealership;

c. a copy of the form is to be sent with the Surplus payment to each defaulting customer to whom a Surplus is Paid and to each defaulting customer from whom a deficiency is sought; and

d. is to be retained by the Dealership, together with all relevant books and records, for at least two (2) years from the date of Disposition.

7. Dealerships are not to seek or obtain waivers of Surplus or redemption rights from Financing Customers, except in the precise manner and circumstances contemplated by the applicable version of Section 9–505 of the Uniform Commercial Code. Under Section 9–505 a waiver of a customer's right to a surplus may not be sought unless the Dealer intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business. If a waiver is sought, the Dealer shall not represent that it thereby proposes to forego its right to a deficiency judgment unless it intends to seek such a judgment should the waiver not be given.

8. The Dealership may seek a deficiency only to the extent allowed by state law.

9. The Dealership shall, in accordance with state law, permit redemption of a repossessed Vehicle at any time prior to a binding agreement for its Disposition, except as may otherwise be provided by the laws of the individual states.

D. The Repossessed Vehicle Surplus/Deficiency system shall state that:

1. The Repossessed Vehicle Surplus/Deficiency system is part of the uniform accounting system and accounting practices referred to in Paragraph 9 of the Direct Dealer Agreement between Chrysler and the Dealership.

2. Failure to adhere to the standards of Paragraph II.C or to account properly to customers for Surpluses may expose the Dealership to legal action by the Federal Trade Commission and/or consumers.

E. Chrysler shall give the Federal Trade Commission thirty (30) days advance notice of any change in its manner and form of carrying out the requirements of Part II of this Order.

F. The Repossessed Vehicle Surplus/Deficiency system shall not apply to sales of repossessed Vehicles subsequent to judicial sales in Louisiana.

G. The Federal Trade Commission has proposed a Trade Regulation Rule that defines duties involved in disposing of a repossessed

Vehicle differently from the method described in Subparagraph II.C.3 above. Said Subparagraph is not to be considered a ratification or acceptance by the Commission of that method of Disposition except for purposes of this Order.

III.

A. *It is further ordered,* That Chrysler:

1. Shall, in the manner and in accordance with the schedule set forth in the Initial Compliance Report, develop and provide assistance and detailed educational materials to each Repurchase Dealership to carry out the purposes of Part II of this Order and of Part VI (insofar as it relates to reinstatement and redemption rights).

2. Shall, commencing no later than one hundred eighty (180) days after the effective date of this Order, include detailed information on all pertinent aspects of Part II of this Order and Part VI (insofar as it relates to reinstatement and redemption rights) in the "Dealership Accounting Conference" and in all comparable successor courses of instruction, and in all courses and training materials dealing with repossession accounting or the rights and duties of the parties with respect to Surpluses, deficiencies, redemption, and reinstatement which may be made available by Chrysler to Dealerships.

3. Shall provide no instructions to Dealerships inconsistent with this Order.

4. Shall, within ninety (90) days of the effective date of this Order, send to each Repurchase Dealership a letter which contains information to the following effect, with nothing to the contrary or in mitigation thereof:

a. state law requires that any surplus generated on the disposition of a repossessed Vehicle must be returned to the defaulting customer;

b. the duty to pay surpluses has existed for many years and the company urges Dealerships to pay all Surpluses on repossessed Vehicles disposed of prior to the date of the letter, as well as those arising later;

c. except in California and Louisiana, state law provides that if a Dealership does not pay a surplus owed, the defaulting customer has the right to recover a penalty equal to "an amount not less than the credit service charge plus 10 percent of the principal amount of the debt or the time price differential plus 10 percent of the cash price";

d. if a customer to whom a Surplus is owed has been reported by

the Dealership or its agent to a credit reporting agency as owing a deficiency, the Dealership should promptly advise such agency of the correct facts; and

e. the Federal Trade Commission has issued complaints against three automobile Dealerships charging that their failure to pay past Surpluses violated federal law.

5. Shall include in the above mailing a copy of this Order and of the Commission's published Analysis of Consent Order, except those portions of the Analysis referring to the Order as a "proposed" Order open to public comment.

6. Shall, within ninety (90) days of the effective date of this Order, develop and provide to all Marketing Investment Department branch personnel (other than clerical employees) educational materials and training to carry out the purposes of Parts II and V of this Order, as described in the Initial Compliance Report.

7. Shall provide to authorized representatives of the Federal Trade Commission upon thirty (30) days written notice a set of mailing labels addressed to an appropriate officer or manager of each Dealership, together with a list containing the same information and a certification that the labels and list are complete and accurate. These materials need be provided only once and are to be used by the Commission solely in connection with the service on Dealerships of any final order issued in Docket Nos. 9072, 9073 or 9074, and related notices.

B. *It is further ordered,* That Chrysler Credit:

1. Shall, within one hundred five (105) days of the effective date of this Order, send to each Dealership to which Chrysler Credit has returned a Vehicle, pursuant to a repurchase agreement, that was repossessed since May 1, 1974:

a. Chrysler Credit's endorsement of the statements in Subparagraphs III.A.4.a-.e above; and

b. a list containing the following data for each Chrysler Credit repossession returned to the Dealership between May 1, 1974 and the effective date of this Order: name, address and account number of the Financing Customer, net payoff and date of repossession of the Vehicle.

2. Shall, within ninety (90) days of the effective date of this Order, develop and provide to all Chrysler Credit branch personnel involved in Repurchase Financing transactions (other than clerical employees) educational materials and training to carry out the

purposes of Parts II and VI of this Order, as described in the Initial Compliance Report.

3. Shall provide no instructions to Repurchase Dealerships inconsistent with this Order.

IV.

It is further ordered, That:

A. To determine whether Dealerships are correctly calculating and Paying Surpluses after implementation of Part II of this Order, Chrysler shall conduct or cause to be conducted a series of audits of Repurchase Dealers as described below and in the Initial Compliance Report.

1. Four successive twelve-month periods shall be audited, as further described in the Initial Compliance Report.

2. One hundred ten (110) Repurchase Dealers and not more than three thousand (3,000) of their Repurchase Financing repossessions per twelve-month audit period shall be audited, selected pursuant to procedures established by the staff of the Federal Trade Commission and set forth in the Initial Compliance Report, plus not more than sixty (60) Dealerships found in the preceding twelve-months' audit to require a further audit as set forth in the Initial Compliance Report.

3. The audit process shall consist of examination of the prescribed number of Repurchase Financing repossessions with resort to relevant books and records as set forth in the Initial Compliance Report. The audit shall include, for each Dealership audited, the preparation of a report ("Dealer Report") as described in the Initial Compliance Report. The Dealer Report shall contain a certification that it is accurate to the best of the knowledge of the person who performed the audit, and that such person has informed the Dealership in writing that it should retain the relevant books and records relating to any non-complying transaction for at least three (3) years after the audit. For each non-complying transaction, the person performing the audit shall attach to the Dealer Report (a) a Transactional Report Form completed in connection with the audit as described in the Initial Compliance Report, and (b) any worksheet he or she prepares in connection with such transaction.

B. Dealer Reports and documents prepared in the course of an audit pursuant to Paragraph IV.A, by the person who performed the audit, shall be maintained by Chrysler for four (4) years following the end of the twelve-month audit period for which they were prepared.

C. Chrysler shall file with the Commission an "Annual Audit Summary" within one (1) year after the end of each twelve-month audit period described in Subparagraph IV.A.1; *provided, however,* that the filing deadline for any such summary otherwise due between the 10th and 31st of December shall instead be January 31 of the following year. Each Annual Audit Summary shall contain the following information in aggregate form:

1. the period audited, the number of Repurchase Dealers audited, and the total number of Repurchase Financing repossessions returned to those dealerships during that period;

2. the number of Repurchase Financing repossessions audited and, with respect to those repossessions:

a. the number and total dollar amount of Surpluses properly calculated and Paid by the Dealers, and the number and total dollar amount of those Surpluses as to which the Dealers' attempts to pay were unsuccessful;

b. the number and total dollar amount of Surpluses which were properly calculated by the Dealers but not Paid, and the number of Dealerships involved;

c. the number of Surpluses not properly calculated by the Dealers, the number of Dealerships involved, and the total dollar amount which was not Paid;

d. the number of deficiencies sought in an amount in excess of the amount permitted by the Repossessed Vehicle Surplus/Deficiency system, the number of Dealerships involved, and the total excess dollar amount sought;

e. the number of repossession transactions in which a waiver of the customer's Surplus rights was sought or obtained, and the number of Dealerships involved;

f. the number of repossession transactions in which one or more entries on the Record of Repossessed Vehicle Sale were not substantiated by information contained in Dealership books and records and (i) as a result thereof the person performing the audit was unable to determine whether or not the disposition resulted in a Surplus or the correct amount thereof in accordance with the Repossessed Vehicle Surplus/Deficiency system, or (ii) the Dealership sought a deficiency in excess of the amount substantiated by information contained in its books and records; and the number of Dealerships involved;

g. the number of repossessed Vehicles disposed of other than to an independent third party, and the number of Dealerships involved;

h. the number of repossessed Vehicles sold at wholesale; and

3. a statement describing the action(s) taken by Chrysler, although none is required, to correct the non-compliance of Dealerships discovered during the audit to have failed to follow the Repossessed Vehicle Surplus/Deficiency system in calculating or Paying Surpluses or in seeking deficiencies.

D. The audits described in Subparagraph IV.A shall be performed by qualified persons as defined in the Initial Compliance Report. The following conditions shall be observed:

1. The Chrysler respondents shall not inform Dealerships or other third parties of the details of the random selection process established by the staff of the Federal Trade Commission, except to the extent described in this Order and in the Initial Compliance Report.

2. The Chrysler respondents shall not inform Dealerships or other third parties (excluding third parties engaged to participate in the audit process) of the details of the audit procedure, the audit periods, or the identity of Dealerships selected for audit, except to the extent described in this Order and in the Initial Compliance Report.

3. Dealerships selected for audit under this Part IV shall not be given more than ten (10) business days advance notice of the scheduled audit.

V.

It is further ordered, That:

A. Chrysler shall, as a shareholder holding a majority of the voting stock of each Equity Dealership (or as it otherwise may become entitled to elect more than 50 percent of the board of directors pursuant to any change in its relationship with Equity Dealerships), exercise all of its lawful rights for the purpose of causing the directors thereof to vote for resolutions requiring that each such Dealership:

1. within sixty (60) days of the effective date of this Order or within sixty (60) days of initiating operation as a Dealership, whichever is later, adopts and maintains the Repossessed Vehicle Surplus/Deficiency system described in Part II of this Order;

2. Pays all Surpluses with respect to repossessed Vehicles returned to the Dealership after the effective date of this Order;

3. shall not seek or obtain waivers of Surplus or redemption

rights from Financing Customers except in strict conformity with Paragraph II.C.7 of this Order; and

4. has an annual examination of its documents by a certified public accounting firm to determine whether the Dealership is following the Repossessed Vehicle Surplus/Deficiency system.

a. The first such examination after the effective date of this Order shall include an inspection of the relevant books and records and the Record of Repossessed Vehicle Sale forms (described in Part II of this Order) for all Repurchase Financing repossessions returned to the Dealership by financing institutions since January 1, 1979; *provided, however,* that such examination need not include repossessions audited pursuant to Part IV of this Order or examined for these purposes in a prior examination by a certified public accounting firm and reported to the Dealership board of directors regarding any non-compliance.

b. Subsequent examinations in succeeding years shall include an inspection of the relevant books and records and the Record of Repossessed Vehicle Sale forms (described in Part II of this Order) for all Repurchase Financing repossessions returned to the Dealership by financing institutions since the period covered by the last annual examination pursuant to Subparagraph V.A.4 and not audited pursuant to Part IV of this Order.

c. Each such examination shall be followed by a report to the Dealership board of directors regarding any non-complying transactions.

B. If any examination required by Subparagraph V.A.4 or any audit conducted under Part IV reveals that an Equity Dealership has any non-complying transaction as defined in the Initial Compliance Report which has not been corrected by the Dealership, then Chrysler shall, as a shareholder holding a majority of the voting stock of that Equity Dealership, exercise all of its lawful rights for the purpose of causing the directors thereof to institute appropriate measures to correct the non-compliance.

C. Chrysler shall (1) ascertain, for each Equity Dealership which becomes a Liquidating Dealership after the effective date of this Order, whether any unpaid Surpluses have arisen since the effective date of the Order or the period covered by the last annual audit by an independent certified public accounting firm during which repossession transactions were examined pursuant to the standards set forth in Part IV of this Order and the Initial Compliance Report, whichever is later, and (2) cause each such Surplus to be paid. *Provided,* that the provisions of Paragraphs V.A, B, and C shall

remain in effect for seventy-five (75) years from the effective date of this Order, at which time the provisions of said Paragraphs will be of no further force or effect.

D. Chrysler shall, within one hundred eighty (180) days of the effective date of this Order, with respect to repossessed Vehicles returned between May 1, 1974 and December 31, 1978 to Dealerships which are Equity Dealerships as of the effective date of this Order, establish to the reasonable satisfaction of the Commission, as described in the Initial Compliance Report, that:

1. all Surpluses have been Paid; and

2. in each instance where a defaulting customer entitled to receive a Surplus pursuant to Subparagraph V.D.1 above had been previously reported by the Dealership or its agent to a credit reporting agency as owing a deficiency, such agency has been subsequently notified of the correct facts.

E. Chrysler shall, within three hundred sixty (360) days of the effective date of this Order, with respect to repossessed Vehicles returned between May 1, 1974 and the effective date of this Order to any Liquidating Dealership which began operation as an Equity Dealership after July 30, 1978 or whose books and records, as of July 30, 1978, were located at the Kansas City, San Francisco or Troy liquidating centers or at the Dealership, establish to the reasonable satisfaction of the Commission, as described in the Initial Compliance Report, that:

1. all Surpluses have been Paid; and

2. in each instance where a defaulting customer entitled to receive a Surplus pursuant to Subparagraph V.E.1 above had been previously reported by the Dealership or its agent to a credit reporting agency as owing a deficiency, such agency has been subsequently notified of the correct facts.

VI.

It is further ordered, That Chrysler Credit:

A. Shall develop revised Chrysler Credit retail installment contract forms that include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than reasonable expenses incurred as a direct result of repossessing (including, where permitted, attorneys' fees and court costs), holding, preparing for Disposition and Dispos-

ing of the Vehicle may be deducted from the Proceeds in determining a Surplus or deficiency; and

2. any Surplus realized on the resale or other Disposition of the Vehicle is to be Paid to the customer.

B. Shall distribute the revised retail installment contract forms to all Dealers who use Chrysler Credit installment contract forms, within one year after the Commission issues a final rule or final adjudicated order no less restrictive than the Paragraph VI.A statements concerning allowable expenses and the duty to pay surpluses. If the Commission's final rule or final adjudicated order is deemed by Chrysler Credit to be less restrictive than the said Paragraph VI.A statements, Chrysler Credit shall (1) within forty-five (45) days after written notice by Commission staff to the Secretary of Chrysler Credit that such rule or order has become final, request a reopening of this proceeding to conform the Paragraph VI.A statements to such rule or order; and (2) perform the above distribution of revised forms within one year after the Commission has acted on its request for conformance.

C. Shall, no later than twelve (12) months after the effective date of this Order, cease and desist the use of any Chrysler Credit retail installment contract form which represents that the debtor may be liable to pay a deficiency where Chrysler Credit knows or should know that it is not entitled under state or federal law to collect a deficiency.

D. Shall direct its branch offices that, commencing thirty (30) days after the distribution to a Dealership of revised Chrysler Credit retail installment contract forms pursuant to Paragraphs VI.B and/or C, they are not to purchase from that Dealership Chrysler Credit forms of retail installment contracts that are not on the revised forms. For a period of two (2) years thereafter, Chrysler Credit shall examine its branch office files at least every twelve (12) months in accordance with the procedures established in the Initial Compliance Report to determine whether prior retail installment contract forms are being used, and, if so, shall institute appropriate corrective action.

E. Shall, commencing seventy-five (75) days after the effective date of this Order, include the following information in clear lay language in a notice (which may be included in a notice of intent to repossess) sent prior to repossession to those Chrysler Credit Financing Customers to whom a notice of intent to repossess is sent:

1. the total amount past due as of the date stated in the notice,

which shall be mailed within five (5) days of the date stated in the notice;

2. in transactions where the customer is entitled under state law to reinstatement of the contract, the customer will have an absolute right to such reinstatement and to regain possession of the Vehicle by paying all past due installments and by paying such other amounts and fulfilling such other conditions as provided by law, or provided by contract and not prohibited by law;

3. that the customer will have an absolute right to redeem the Vehicle at any time prior to a binding agreement for its Disposition, except as otherwise provided by state law, and that this right can be exercised by paying the Contract Balance plus all reasonable expenses incurred as a direct result of repossessing the Vehicle (including, where permitted, attorneys' fees and court costs), holding it, and preparing it for Disposition;

4. the date prior to or interval of time during which the Vehicle will not be Disposed of;

5. that if the Vehicle is not redeemed (nor the contract reinstated) the customer will be entitled to a refund of any Surplus, and that where the Vehicle is returned to the Dealership such refund is to be made within forty-five (45) days after Disposition (the notice may also state that the refund should be made by the Dealer);

6. that failure to account for and refund a Surplus will give the customer a right to sue for the amount of the Surplus and, except in California and Louisiana, for statutory penalties as provided by state law; and

7. the statutory limitations and restrictions on the right of Chrysler Credit and the Dealership to collect a deficiency.

F. Shall, within sixty (60) days after the effective date of this Order, establish and follow a procedure for uniformly sending a written notice ("post-repossession notice") to each Chrysler Credit Financing Customer as soon as practicable after repossession. The post-repossession notice shall specify in clear, lay language:

1. the name, address and telephone number of the Dealership to which the Vehicle has been or will be returned for Disposition, if applicable, and the address and telephone number of the Chrysler Credit branch office to be contacted;

2. the date or interval of time within which the customer may reinstate the contract in states where the creditor is required to permit reinstatement of the contract;

3. the net amount necessary to redeem the Vehicle, and, in transactions where the customer is entitled to reinstatement, the

amount necessary to reinstate the contract, at the time the notice is sent;

4. the date or interval of time prior to which the Vehicle will not be sold;

5. that the Vehicle can be redeemed at any time prior to a binding agreement for its Disposition, except as otherwise provided by state law;

6. that under the law the only expenses which need be paid upon redemption are reasonable expenses incurred as a direct result of repossessing the Vehicle, holding it, and preparing it for Disposition; and that these may increase in amount if redemption is delayed;

7. that Chrysler Credit should be contacted for further information about reinstatement of the contract, in states where the customer is entitled to reinstatement;

8. that Chrysler Credit should be contacted for further information about redemption including the procedure for redeeming the Vehicle;

9. that if the Vehicle is not redeemed (nor the contract reinstated) the customer is entitled to a refund of any surplus, and that where the Vehicle is returned to the Dealership such refund is to be made within forty-five (45) days after Disposition (the notice may also state that the refund should be made by the Dealer);

10. that in those instances where the Vehicle is returned to the Dealership, the Dealership is to send a copy of the Record of Repossessed Vehicle Sale to each defaulting customer to whom a Surplus is Paid or from whom a deficiency is sought;

11. that failure to account for and refund a Surplus will give the customer a right to sue for the amount of the Surplus and, except in California and Louisiana, for statutory penalties as provided by state law;

12. that the customer may be liable for a deficiency or that state law restricts or prohibits Chrysler Credit and the Dealership from collecting a deficiency (the notice is to include the applicable language only); and

13. that the customer has the right to direct the Dealership to apply for a rebate of any unearned premiums payable by any insurance carrier or agent from whom the Dealership has, on behalf of the customer, obtained a credit life, accident and health, or collision insurance policy.

G. Shall, for a period of two (2) years commencing seventy-five (75) days after the effective date of this Order, examine its branch files at least once every twelve (12) months in accordance with the

procedures established in the Initial Compliance Report to determine whether the notices required by Paragraphs VI.E and F have been and are being sent, and shall institute appropriate actions to assure that this procedure is adhered to.

H. Shall take no action to obtain or attempt to obtain or bring about any waiver of a Financing Customer's redemption or Surplus rights, except in the precise manner and circumstances contemplated by the applicable version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless the secured party intends to retain the collateral for its own use for the immediate future rather than to (1) resell it in the ordinary course of business or (2) return it to another party pursuant to a repurchase agreement. If a waiver is sought, Chrysler Credit shall not represent that it thereby proposes to forego its right to a deficiency judgment unless it intends to seek such a judgment should the waiver not be given.

I. Shall instruct its branch office personnel involved in Repurchase Financing transactions to cease and desist from making any representation, directly or by implication, contrary to the representations required by Paragraphs VI.E and F of this Order, and shall within sixty (60) days of the effective date of this Order establish procedures which reasonably assure strict adherence by branch personnel to these instructions.

J. Shall, within twelve (12) months after the effective date of this Order, revise all pertinent Chrysler Credit forms (including but not limited to repurchase agreement forms, form letters, and notices) and internal written procedures to be consistent with the provisions of this Order, as described in the Initial Compliance Report.

VII.

It is further ordered, That:

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, finance companies or institutions, or Vehicle Dealerships than a provision or provisions of this Order relative to (1) the disposition of repossessed Vehicles, (2) the determination, calculation or communication of the existence of or the amount of Surpluses or deficiencies, including waivers of Surplus rights, or the time or manner of paying or accounting for Surpluses or deficiencies, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less

restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this Order. The enumeration of the subject matter contained in clauses (1), (2) and (3) of this Paragraph is exclusive. *Provided, however,* that a Chrysler Respondent shall advise the Commission of its intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this Order thirty (30) days in advance of reliance thereon. *Provided further* that this Paragraph shall not be construed as exempting the Chrysler Respondents from any Trade Regulation Rule, or as limiting in any way their legal right or standing to challenge or otherwise contest any Trade Regulation Rule.

B. In the event any of the proceedings bearing Docket Nos. 9072, 9073, or 9074 results in a final adjudicated or consent order applying standards less restrictive on any automobile manufacturer, finance company, or Vehicle Dealership than a provision or provisions of this Order relative to:

1. the disposition of repossessed Vehicles;
2. the determination, calculation or communication of the existence of or the amount of Surpluses or deficiencies, including waivers of Surplus rights, or the time or manner of paying or accounting for Surpluses or deficiencies; or
3. the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem);

then the Commission shall, within one hundred twenty (120) days of a Chrysler Respondent's request pursuant to Section 2.51 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this Order and/or other relief, as necessary and appropriate, to conform this Order to such less restrictive standards applied in the other order(s). The enumeration of the subject matter contained in clauses B.1, 2, and 3 of this Paragraph is exclusive.

C. In the event a Chrysler Respondent is of the opinion that changed conditions of law or fact require that this Order be altered, modified, or set aside, or that the public interest so requires, the Chrysler Respondent may, pursuant to Section 2.51 of the Commission's Rules of Practice, file a request for reopening of this proceeding for that purpose.

VIII.

It is further ordered, That:

A. Each Chrysler Respondent shall, as described in the Initial Compliance Report, maintain complete business records relative to the manner and form of its compliance with this Order and shall retain all such records for at least three (3) years, and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission. Except as provided in Paragraph III.A.7 of this Order, respondents will disclose the identity or identities of any individual Dealership or Dealerships to Commission representatives only upon service of a civil investigative demand issued under Section 2.7 of the Rules of Practice of the Federal Trade Commission.

B. Each of the Chrysler Respondents shall, within one hundred eighty (180) days after the effective date of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order and has implemented the Initial Compliance Report submitted with the Agreement Containing Consent Order.

C. Chrysler shall, within four (4) weeks of the effective date of this Order, distribute a copy of this Order to its U.S. Automotive Sales Division, to each Zone Manager, and to its Marketing Investment Department and each of its branch offices. Chrysler Credit shall, within the same time frame, distribute a copy of this Order to each of its branch offices.

D. Each of the Chrysler Respondents shall notify the Commission at least thirty (30) days prior to any corporate change which may reasonably be expected to affect compliance obligations arising out of this Order such as those dissolutions, assignments or sales resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change which may reasonably be expected to affect compliance with this Order. Chrysler shall notify the Commission at least thirty (30) days prior to effecting any change in its program for investing in Equity Dealerships, which may reasonably be expected to affect compliance with this Order.

In the Matter of

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Feb. 13, 1981

Denial of respondent's motions seeking disqualification of Chairman Pertschuk respecting issues outside the scope of his prior recusal.

Order

On July 21, 1980, respondent Kellogg Company ("Kellogg") filed a motion requesting Chairman Pertschuk to disqualify himself from all further participation in any aspect of this case or, in the alternative, that the Commission direct his disqualification. On August 5, 1980, respondent General Mills, Inc. ("General Mills") likewise moved to disqualify the Chairman. On September 22, 1980, Chairman Pertschuk filed a memorandum declining to disqualify himself and referring the matter to the full Commission for consideration of the alternative requests of Kellogg and General Mills that the Commission direct his disqualification. Chairman Pertschuk's response was placed on the public record and served on respondents.[1] For the reasons stated in the Chairman's September 22, 1980, memorandum, and the additional reasons discussed below, the alternative requests of Kellogg and General Mills are denied.

I.

Kellogg contends that "a decisionmaker cannot legally recuse himself from part of an adjudicative proceeding, while purporting to reserve to himself the right to continue presiding over the remainder of that proceeding." (Kellogg Motion at 3.) In support, Kellogg cites the same authorities and rationales as those it advanced in connection with its earlier request that Judge Berman be disqualified from presiding over the proceedings on the merits of the Commission's complaint.[2]

We cannot agree with Kellogg that the Chairman's recusal from the proceedings concerning Judge Hinkes' retirement mandates his disqualification from the proceedings on the merits. Each of the

[1] Because Chairman Pertschuk has himself referred the alternative requests to the Commission for decision without his participation, we need not consider whether, absent such a referral, the Commission would have power to disqualify one of its members over that member's objection.

[2] See Memorandum In Support of Motion of Respondent Kellogg Company to Disqualify Administrative Law Judge or, In the Alternative, for Related Discovery (Feb. 1, 1980); Memorandum of Respondent Kellogg Company in Reply to Complaint Counsel's Answer to Motion to Disqualify Administrative Law Judge (Feb. 11, 1980); Memorandum of Respondent Kellogg Company to the Commission In Support of Its Motion to Disqualify Administrative Law Judge or, In the Alternative, For Related Discovery (Feb. 20, 1980).

arguments advanced by Kellogg in support of its request has already been considered, and rejected, in our July 31, 1980, order in which we declined to disqualify Judge Berman. There, we stated:

> [T]he inquiry concerning the circumstances of Judge Hinkes' retirement is "distinct and separable" from the proceedings on the merits of the complaint. * * * The proceedings involve different witnesses and testimony, bearing upon different legal and factual issues.

In these circumstances, in the absence of any statute providing to the contrary,[3] the case law has permitted partial disqualification with respect to discrete aspects of what amounts to a single proceeding. *Warner* v. *Rossignol,* 538 F.2d 910, 913 n.6 (1st Cir. 1976) (trial judge disqualified from participating in damages phase of trial retained power to deny subsequently filed motion for new trial); *United States* v. *Lawrenson,* 334 F.2d 468 (4th Cir. 1964) (fact that judge assigned civil action, which was related to criminal prosecution, to another judge after presentation of affidavit of prejudice was no basis for disqualification from subsequent motions in criminal case); *Middletown Nat'l Bank* v. *Toledo, A.A. & N.M. R. Co.,* 105 F. 547 (S.D.N.Y. 1900); *Coastal Petroleum Co.* v. *Mobil Oil Corp.,* 378 So.2d 336 (Fla. App. 1980) (trial judge recused as to issues severed for separate trial properly reserved jurisdiction to enter final judgment on issues already tried); *Flannery* v. *Flannery,* 452 P.2d 846, 849 (Kan. 1969) (judge disqualified from presiding over divorce case based on knowledge of disputed facts was authorized to hear motion to modify divorce decree); *Price* v. *Gibson,* 192 P.2d 219, 224 (Kan. 1978) (probate judge disqualified from admitting will to probate because of his knowledge of testamentary capacity of testator was authorized to preside over matters arising in administration of estate).[4]

In some situations nothing less than full disqualification is

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[3] There is no statutory requirement that one who is disqualified from a separate, collateral phase of an adjudication is barred from participating in the decision of its other aspects. Indeed, the Commission's treatment of disqualification motions is an example. The Commissioner whose exclusion is sought in effect disqualifies himself from participating in the Commission's decision of that matter. That limited disqualification, however, does not automatically take the challenged Commissioner out of the remainder of the proceedings. Compare 5 U.S.C. 556(d). No court has specifically considered the question presented here in the context of an administrative proceeding from which a decisionmaker has partially withdrawn. However, *United Air Lines, Inc.* v. *CAB,* 281 F.2d 53 (D.C. Cir. 1960), implicitly supports our view that the procedures adopted in this case are proper. There, the court ordered the CAB to conduct an inquiry into claims of improper *ex parte* contacts raised on review of CAB orders. After the remand, the court sustained the procedures adopted by the CAB, specifically noting that the inquiry had been conducted "before a new examiner" who issued an initial decision limited to the *ex parte* issues. *United Air Lines* v. *CAB,* 309 F.2d 238, 239 (D.C. Cir. 1962).

[4] In "bifurcated" trials, evidence on the issue of damages is heard following a decision by the trier of fact on the question of liability. There is no requirement in such instances that the same trier of fact rule on the question of damages. See, *e.g., Foerester* v. *Illinois Bell Tel. Co.,* 315 N.E.2d 63, 66, 20 Ill.App.3d 656 (1974); *State ex rel. La Follette* v. *Raskin,* 34 Wis.2d 607, 150 N.W.2d 318 (1967). Likewise, in proceedings where legal and equitable issues are mingled, a trial judge may try and determine the equitable issues while the jury is simultaneously deciding the legal issues. See *Schoenfeld* v. *Atomic Products Corp.,* 350 N.Y.S.2d 736 (App. Div. 1973); *Scontsas* v. *Citizens Ins. Co.,* 112 N.H. 47, 289 A.2d 64 (1972).

required. For example, when the decisionmaker has a financial interest in the outcome of the proceedings, or is related to one of the parties, it is obvious that partial disqualification would not cure any actual or apparent impropriety. That is not, however, the situation that we have before us. Chairman Pertschuk's withdrawal from further participation in Commission consideration of motions and requests relating to the contractual arrangement with Judge Hinkes was based on the possibility that the Commission in its deliberations concerning that separate aspect of the case might be called upon to consider the validity of the Chairman's actions, including the legal sufficiency of statements submitted by him to the Commission, and on the possibility that his testimony concerning the offer of the contract might be requested. Cf. *Flannery* v. *Flannery, supra; Price* v. *Gibson, supra.* But these possibilities do not impair his ability impartially to decide the remaining issues in the case. As we indicated in our January 29, 1979, order denying a similar motion by General Foods' requesting disqualification of the Chairman and each other Commissioner advised in advance of the Hinkes' contract offer, the problem which arose out of Judge Hinkes decision to retire presented managerial questions that are normally the province of the Chairman. (See Reorg. Plan No. 8 of 1950, 64 Stat. 1264.) Issues arising out of that managerial decision are distinct from the substantive merits of the case. As the record in the Commission's continuing inquiry into the Bureau of Competition's role in the Hinkes contract offer now stands there is nothing that creates even an appearance of partiality.[5]

II.

General Mills presents a somewhat different argument. Chairman Pertschuk participated in Commission orders of December 8, 1978, January 29, 1979, November 13, 1979, and March 19, 1980. Each of these orders disposed of motions and requests of respondents pertaining to the contractual arrangement with Judge Hinkes. On July 18, 1980, the Chairman recused himself from Commission consideration of then pending motions requesting further fact-finding concerning the circumstances of the contractual arrangement with Judge Hinkes. General Mills contends that the facts upon which the Chairman based his July 18, 1980, recusal were relevant to

[5] As Chairman Pertschuk noted in his statement of July 18, 1980, (p. 1), his impartiality is "confirmed by the fact that, after reviewing the arguments made by respondent, [he] reversed [his] previous decision and determined not to submit the Hinkes contract to the Office of Personnel Management for approval, thereby affording respondents much of the relief they were seeking." See Separate Statement of Chairman Pertschuk attached to the Commission's order of December 8, 1978.

the resolution of the four aforementioned orders, and that the Chairman's failure to also recuse himself from those deliberations so tainted his appearance of impartiality that he is now required to disqualify himself from the entire case. (General Mills Motion at 2.) General Mills does not articulate why, if Chairman Pertschuk's participation in the four cited orders was improper, his disqualification from all further participation in the proceedings on the merits is now required.[6] In any event, we disagree with General Mills' characterization of the aforementioned Commission orders.

In his July 18, 1980, memorandum, the Chairman observed that certain statements referring in part to action taken by him with respect to the Hinkes contractual arrangement had been submitted to the Commission. Because, as we have discussed above, the resolution of motions and requests then pending before the Commission pertaining to the need for additional fact-finding required consideration of the sufficiency of his statements, the Chairman concluded that his participation in those deliberations would be inappropriate. (Pertschuk Memorandum at 2.) None of the four earlier Commission orders involved comparable considerations. Thus his participation in those orders was not inconsistent with his subsequent recusal, nor did such participation raise an appearance of bias or prejudgment.

It is therefore ordered, That the motions of Kellogg and General Mills seeking Chairman Pertschuk's disqualification with respect to issues outside the scope of his prior recusal are denied.

Chairman Pertschuk and Commissioner Pitofksy did not participate.

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[6] As discussed in Part I *supra*, we have already held that the Commission's inquiry into the circumstances surrounding the contractual arrangement with Judge Hinkes is "distinct and separable" from the proceedings on the merits of the Commission's complaint.

In the Matter of

GLENDINNING COMPANIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8824. Decision, Oct. 26, 1976—Modifying Order, Feb. 24, 1981

This order reopens the proceeding and modifies the cease and desist order issued against the company In the Matter of Glendinning Companies, Inc., *sub nom.,* The Coca-Cola Company, et al., on October 26, 1976, 88 F.T.C. 565, 41 FR 53653, by deleting the language "including all entry forms submitted by participants therein," from Paragraph 1(c), which required the company to keep all entry forms submitted in connection with both games of chance and games of skill, and adding to Paragraph 2 of the order, specified language which limits respondent's record-keeping obligation to maintaining only those entry forms submitted for games of skill.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Petitioner, Glendinning Companies, Inc., seeks the modification of a record-keeping provision of the Order to Cease and Desist issued on October 26, 1976. Petitioner is engaged in the manufacture, promotion, sale, and distribution of promotional games used to induce the sale of products. On October 23, 1980, petitioner sought from the Commission an advisory opinion, pursuant to Rule 2.41 of the Federal Trade Commission's Rules of Practice, interpreting the phrase "all entry forms" in Paragraph 1(c) of the Order to apply solely to games of skill, and not to games of chance. On November 7, 1980, petitioner was informed that an advisory opinion was not the appropriate vehicle for the requested relief, and that the request would be treated as a Petition to Reopen and Modify the Order pursuant to Rule 2.51 of the Rules of Practice. The petition was accordingly placed on the public record for comment for thirty days. No comments were received.

Paragraph 1(c) now orders petitioner to cease and desist from:

1. Engaging in, promoting the use of, or participating in any such promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in such connection therewith, full and adequate records *including all entry forms submitted by participants therein,* which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto;

which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative. (Emphasis supplied.)

Thus, petitioner is currently required to save, for two years, all entry forms submitted in both chance and skill contest promotions. Petitioner asserts that while this requirement makes sense when applied to games of skill, it serves no useful purpose in the case of games of chance. In skill contests, entry forms can be inspected by the Commission to determine whether prizes were awarded to contestants who submitted the correct entries. In games of chance, however, all entry forms are identical, and winners are selected by random drawing. The forms are therefore of no value in determining whether the promotion was fairly conducted. The storage of these forms does, however, impose significant costs upon petitioner.

Petitioner and Compliance staff have agreed upon proposed modifications to the Order that would limit petitioner's obligation to maintain all entry forms to those submitted in games of skill. This would be accomplished by moving the language requiring petitioner to maintain entry forms from Paragraph 1 of the Order, which governs both skill and chance promotions, to Paragraph 2, which only concerns skill contests. The Commission, having considered the Petition, determines that petitioner has made a satisfactory showing that the public interest requires that the Order be reopened and modified as requested.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on October 26, 1976, is hereby modified by:

(1) Deleting the italicized language from Paragraph 1(c):

There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in such connection therewith, full and adequate records *including all entry forms submitted by participants therein,* which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative; and

(2) Adding the following language to Paragraph 2:

(f) Respondent or its designee maintains for at least two years

after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

IN THE MATTER OF

REVLON, INC., ET AL.
and
DELUXOL LABORATORIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Dockets C-2868 and C-2869. Decision, Jan. 3, 1977—Modifying Order, Feb. 24, 1981.

This order reopens the proceeding and modifies the Commission order issued on January 3, 1977, 42 FR 17108, 89 F.T.C. 1, by amending Paragraph IA4 to permit conditioning and manageability claims with proper substantiation.

ORDER GRANTING REQUEST TO REOPEN THE PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

Revlon, Inc., on behalf of itself and its subsidiaries Revlon-Realistic Professional Products, Inc. and Deluxol Laboratories, Inc., having requested on December 4, 1980 that the Commission reopen the proceedings in Dockets C-2868 and C-2869 for the purpose of modifying the Order to Cease and Desist entered in those dockets; and

The Commission having placed such request, together with supporting documents attached thereto, upon the public record for a period of thirty (30) days, pursuant to Section 2.51 of its Rules; and

The Commission having duly considered the comments filed thereafter by interested persons; and

The Commission being of the opinion that the public interest would be served by such reopening of the proceedings;

Now, therefore, it is ordered, That the proceedings in Dockets C-2868 and C-2869 be, and they hereby are, reopened; and

It is further ordered, That the Order in Dockets C-2868 and C-2869 be modified by amending Paragraphs IA4 as follows:

4. Any hair straightening product conditions or helps condition or improves condition of hair or makes or helps make hair more manageable, unless, at the time the representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

It is further ordered, That the foregoing modifications shall be effective upon service of this order.

In the Matter of

BENTON & BOWLES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3055. Complaint, March 4, 1981—Decision, March 4, 1981

This consent order requires, among other things, a New York City advertising agency to cease, in connection with the advertising and sale of Encare or any similar over-the-counter vaginal contraceptive suppository product, misrepresenting or failing to substantiate claims relating to the product's effectiveness, safety and performance characteristics. The firm is further prohibited from disseminating advertisements using performance or quality heightening modifiers such as "highly," or "extremely," in conjunction with words like "effective" or "reliable." Additionally, the order requires the company to disclose in print, radio and TV consumer advertising, certain facts material to contraceptive suppository use; and to maintain business records for a period of three years.

Appearances

For the Commission: *Shirley F. Sarna* and *Paula K. Stein.*

For the respondent: *Stuart L. Friedel, Davis & Gilbert,* New York City.

Complaint

The Federal Trade Commission, having reason to believe that Benton & Bowles, Inc., a corporation (hereinafter "respondent"), has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Paragraph 1. Benton & Bowles, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.

Allegations stated in the present tense include the past tense.

Par. 2. For purposes of this complaint the following definitions shall apply:

(1) A "*vaginal contraceptive suppository*" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

(2) "*Use effectiveness*" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of

subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

(3) "*Commerce*" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent Benton & Bowles, Inc. is an advertising agency for Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc. In such capacity respondent Benton & Bowles, Inc. has prepared and placed advertising for publication and has caused the dissemination of advertising, including the advertising referred to herein, to promote the sale of a vaginal contraceptive suppository product named "Encare" or "Encare Oval" (hereinafter "Encare") a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business respondent has disseminated or caused the dissemination of certain advertising concerning Encare (1) by United States mail, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio broadcasts of interstate transmission for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare; or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare in or having an effect upon commerce.

PAR. 5. Respondent has disseminated or caused the dissemination of the advertisement identified as Attachment 1 which is incorporated by reference herein.

PAR. 6. Through the use of this advertisement, respondent represents, directly or by implication, that:

1. Encare has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").

2. Encare has novel contraceptive performance characteristics.

PAR. 7. In truth and in fact:

1. Encare's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.

2. Encare does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertising and representations referred to in Paragraphs Five and Six are false, deceptive or misleading.

PAR. 8. At the time respondent made the representations alleged in Paragraph Six, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 9. Through dissemination of the advertisement identified as Attachment 1, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

1. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
2. Some Encare users experience irritation in using the product.
3. Encare requires a waiting period of ten minutes before intercourse.

PAR. 10. Furthermore, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 11. The facts described in Paragraphs Nine and Ten are material with respect to the consequences which may result from use of Encare as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertising referred to in Paragraphs Four and Five false, deceptive or misleading.

PAR. 12. Furthermore, through the use of the advertising referred to in Paragraphs Four and Five, respondent, directly or by implication, favorably compares some characteristics of Encare to the pill or the IUD and represents in the same advertising that Encare has an extremely high use effectiveness. Favorable comparison of Encare to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Encare's use effectiveness is equal to that of the pill or IUD. Respondent fails to disclose the material fact that Encare has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 13. The fact described in Paragraph Twelve is material in light of the comparative representations made in respondent's advertising. Respondent's failure to disclose this material fact in advertising containing such comparative representations renders

the advertising referred to in Paragraphs Four and Five false, misleading or unfair.

PAR. 14. In the course and conduct of its business, and at all times mentioned herein, respondent is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of services of the same general kind and nature as are sold by respondent.

PARA. 15. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices and the dissemination of the aforesaid false advertising has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent as herein alleged, including the dissemination of false advertising, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.

Birth control Now it's as simple as this.

At last, Encare.™

Neat, compact, no bigger than your fingertip, Encare™ is fast becoming the most talked about contraceptive we have today.

Free from hormonal side effects. Encare™ is available without a prescription. And it might well be the easiest method of birth control you will ever use.

Simply simple.

You simply insert Encare™ with the tip of your finger. There's no fiddling, measuring, no tubes, no applicators. And no messy paraphernalia to clean up afterward. Each tiny insert contains an exact, premeasured amount of the clinically proven spermicide, nonoxynol 9.

Simply effective.

Very simply, Encare™ works by neutralizing sperm. When used properly, Encare™ melts and gently effervesces, spreading throughout your vagina for protection against pregnancy.

Even under very rigorous testing conditions, Encare's spermicide was found to be highly effective.

Simply safe.

And if you ask your gynecologist about Encare,™ you'll be reassured to hear that Encare™ cannot harm your body the way the pill or IUD might.

Which means, you simply won't be worried about those complications.

Encare

For maximum protection, it is essential that you read and follow directions carefully and, if indicated, consult your physician. No birth control method is guaranteed to prevent pregnancy.

Birth control, simplified.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charge in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Benton & Bowles, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

This Order applies to respondent Benton & Bowles, Inc. its successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device; *provided however,* that this Order shall not apply to ethical (professional) advertising prepared or disseminated by Medicus Communications, Inc. for any OTC (over-the-counter) contraceptive product other than Encare or any other vaginal contraceptive

suppository product. Except as otherwise provided, Order provisions apply to any act taken in connection with respondent's advertising, offering for sale, sale or distribution of Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this Order are not intended to set a standard for drug products other than OTC contraceptives.

For purposes of this Order, the following definitions shall apply:

1) "*Use effectiveness*" or effectiveness "*in actual use*" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "*Encare*" means the vaginal contraceptive suppository product marketed under the tradename Encare or Encare Oval, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

3) "*Advertisement*" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; *provided, however,* that the term advertisement does not include material which solely refers to the product without making any claims for the product.

4) "*Product or use characteristic*" includes but is not limited to efficacy, safety or convenience.

I

It is ordered, That respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Encare which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness

of any OTC contraceptive product; unless respondent neither knew nor should have known that the representation was false, deceptive or misleading.

C. Representing, directly or by implication, that Encare has novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; *provided, however,* that respondent may represent that Encare is effective or reliable or make other effectiveness claims as permitted by this Order (for example, "Encare provides reliable protection against pregnancy").

II

It is ordered, That respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Encare:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, you should ask your doctor which contraceptive method, including Encare, is best for you.

C. Some Encare users experience irritation in using the product.

D. It is essential that you insert Encare at least ten minutes before intercourse.

E. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in type at least as large as the type face of the major portion of the text of the advertising copy. Disclosures D and E shall be separate and distinguishable from the main body of the advertisement for the period from the date of signing of this Order to February 19, 1982.

III

It is further ordered, That respondent make the following affirmative disclosure in any consumer (lay) print advertisement for Encare in which any product or use characteristic of Encare is compared, directly or by implication, to any product or use characteristic of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD"):

Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the advertisement specified for Disclosure II.E.

IV

It is further ordered, That respondent make the following disclosures in any consumer (lay) TV advertisements for Encare:

A. Follow directions exactly, including the ten minute waiting period.

B. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure IV.A consistent with such reasonable basis.

V

It is further ordered, That respondent make the following disclosure in any consumer (lay) radio advertisements for Encare:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI

It is further ordered, That respondent shall make the following disclosures in ethical (professional) advertisements for Encare.

A. Irritation accompanies use of the product in some instances.

B. Encare must be inserted according to product instructions and at least ten minutes before intercourse.

C. Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same as or substantially similar to the language set forth above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the advertising copy.

VII

It is further ordered, That respondent cease and desist from:

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.

VIII

It is further ordered, That respondent maintain complete business records relative to the manner and form of its compliance with this Order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements; and documents which substantiate or contradict any claim made in advertising, promoting or selling the products. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

IX

It is further ordered, That respondent forthwith deliver a copy of this Order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Encare or in any aspect of the preparation, creation or placing of advertising for Encare on behalf of respondent. A statement acknowledging receipt of this Order shall be obtained in each case.

X

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporation which may affect compliance obligations arising out of this Order.

XI

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this Order, file with the Commission a report setting forth in detail the manner and form in which it has complied with this Order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

SHALLER RUBIN ASSOCIATES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3056. Complaint, March 4, 1981—Decision, March 4, 1981

This consent order requires, among other things, a New York City advertising agency to cease, in connection with the advertising and sale of Encare or any similar over-the-counter vaginal contraceptive suppository product, misrepresenting or failing to substantiate claims relating to the product's effectiveness, safety and performance characteristics. The firm is further prohibited from disseminating advertisements using performance or quality heightening modifiers such as "highly," or "extremely," in conjunction with words like "effective" or "reliable." Additionally, the order requires the company to disclose in print, radio and TV consumer advertising, certain facts material to contraceptive suppository use; and maintain business records for a period of three years.

Appearances

For the Commission: *Shirley Sarna* and *Paula Steiner.*

For the respondent: *Ellis Ratner, Davis & Gilbert,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Shaller Rubin Associates, Inc., a corporation (hereinafter "respondent"), has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Shaller Rubin Associates, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

(1) A "*vaginal contraceptive suppository*" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

(2) "*Use effectiveness*" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of

subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

(3) *"Commerce"* means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent Shaller Rubin Associates, Inc. is a former advertising agency for Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc. In such capacity respondent Shaller Rubin Associates, Inc. has prepared and placed advertising for publication and has caused the dissemination of advertising, including the advertising referred to herein, to promote the sale of a vaginal contraceptive suppository product named "Encare" or "Encare Oval" (hereinafter "Encare") a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business respondent has disseminated or caused the dissemination of certain advertisements concerning Encare (1) by United States mail, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio broadcasts of interstate transmission for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare; or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare in or having an effect upon commerce.

PAR. 5. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondent's advertisements but not all inclusive thereof, is the advertisement identified as Attachment 1 which is incorporated by reference herein.

PAR. 6. Through the use of this advertisement, and others not specifically set forth herein, respondent represents, directly or by implication, that:

1. Encare has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").

2. Encare has novel contraceptive performance characteristics.

PAR. 7. In truth and in fact:

1. Encare's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.

2. Encare does not have novel contraceptive performance charac-

teristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertisements and representations referred to in Paragraphs Five and Six are false, deceptive or misleading.

PAR. 8. At the time respondent made the representations alleged in Paragraph Six, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 9. Through dissemination of the advertisement identified as Attachment 1, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

1. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
2. Some Encare users experience irritation in using the product.
3. Encare requires a waiting period of ten minutes before intercourse.

PAR. 10. Furthermore, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 11. The facts described in Paragraphs Nine and Ten are material with respect to the consequences which may result from use of Encare as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertisements referred to in Paragraphs Four and Five false, deceptive or misleading.

PAR. 12. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondent, directly or by implication, favorably compares some characteristics of Encare to the pill or the IUD and represents in the same advertisement that Encare has an extremely high use effectiveness. Favorable comparison of Encare to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Encare's use effectiveness is equal to that of the pill or IUD. Respondent fails to disclose the material fact that Encare has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 13. The fact described in Paragraph Twelve is material in light of the comparative representations made in respondent's advertisements. Respondent's failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Four and Five false, misleading or unfair.

PAR. 14. In the course and conduct of its business, and at all times mentioned herein, respondent is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of services of the same general kind and nature as are sold by respondent.

PAR. 15. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent as herein alleged, including the dissemination of false advertising, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.

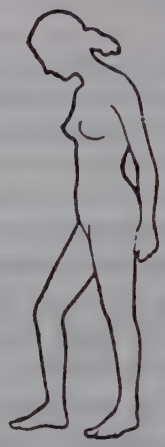
THE FACTS:

1 HUNDREDS OF THOUSANDS OF AMERICAN WOMEN ARE ALREADY USING ENCARE OVAL™

Encare Oval™ was introduced in the U.S. to doctors in November 1977, and has drawn the attention of both the medical profession and the public to a greater extent than any contraceptive product since the pill.

Gynecologists have been recommending it with high frequency. And Encare Oval already has become the vaginal contraceptive most often recommended by pharmacists.

Today Encare Oval is being used by hundreds of thousands of women, and users surveyed report overwhelming satisfaction. Encare Oval™ users say they find it an answer to their concerns about the pill, IUDs, diaphragms, and aerosol foams.



2 ITS EFFECTIVENESS HAS BEEN ESTABLISHED IN CLINICAL TESTS.

In a recent U.S. clinical study, Encare Oval was subjected to one of the most rigorous tests ever conducted for a vaginal contraceptive. It showed that Encare Oval provides consistent and extremely high sperm-killing protection. These excellent results support earlier studies in European laboratories and clinics.

Each Encare Oval insert contains a precise, premeasured dose of the potent sperm-killing agent, nonoxynol 9. Once properly inserted, Encare Oval melts and gently effervesces, dispersing the protective, sperm-killing agent within the vagina.

It is known that the success of any contraceptive method depends on consistent and accurate use. Encare Oval™ has been designed to be so convenient, you won't be tempted to forget it. And so simple to insert, it's hard to make a mistake.

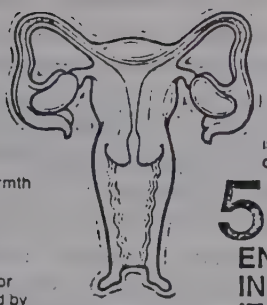
If you've been advised not to become pregnant for reasons of health, a decision about any contraceptive method should be made after consultation with your doctor.

3 UNLIKE THE PILL, ENCARE OVAL HAS NO HORMONAL SIDE EFFECTS.

Encare Oval™ is free of hormones, so you're sure it won't disrupt your hormonal chemistry. Encare Oval™ cannot create hormone-related health problems—like strokes and heart attacks—that have been linked to the pill.

And because you don't take the pill, there's none of the associated weight gain, bloating, or breast enlargement. Since there is no hormonal disruption of your

The most contraceptive



menstrual cycle your periods should remain normal.

In some cases a feeling of warmth has been reported when using Encare Oval. This is usually no cause for concern.

In a limited number of cases, however, a burning sensation or irritation has been experienced by either or both partners. This can occur in varying degrees with virtually all vaginal contraceptives.

In these instances, use should be discontinued.

4 ENCARE OVAL IS EASIER TO INSERT THAN A TAMPON.

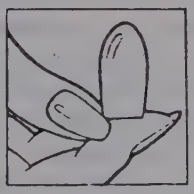
The Encare Oval is smooth and small, so it inserts quickly and easily—without an applicator. Simply use as directed.

There's none of the bother of aerosol foams and diaphragms. Just insert an Encare Oval when you need protection. There's nothing to wear. No device inside you to slip out of place. No pill to remember every day.

Each Encare Oval provides maximum protection during the period from 10 minutes to 1 hour after insertion.

You can buy Encare Oval whenever you need it...it's available without a prescription. And each Encare Oval is individually wrapped to fit discreetly into your pocket or purse.

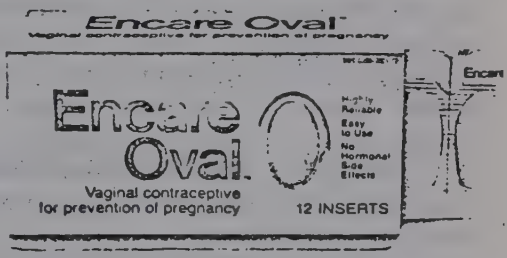
5 BECAUSE ENCARE OVAL IS INSERTED IN ADVANCE, IT WON'T INTERRUPT LOVEMAKING.



Since there's no fuss or bother, Encare Oval encourages spontaneity, providing a measure of freedom many other contraceptives can't match.

The hormone-free Encare Oval. *Safer* for your *system* than the *pill* or *IUD*. Neater and simpler than traditional vaginal contraceptives. So effective and easy to use that hundreds of thousands have already found it—quite simply—the preferred contraceptive.

© 1978 Eaton-Merz Laboratories, Inc.
Norwich, New York 13815 EA-1615



talked about since the pill.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order and admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Shaller Rubin Associates, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

This Order applies to respondent Shaller Rubin Associates, Inc. its successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with respondent's advertising, offering for sale, sale or distribution of Encare or any OTC (over-the-counter) contraceptive product in or affecting commerce within the United

States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this Order are not intended to set a standard for drug products other than OTC contraceptives.

For purposes of this Order, the following definitions shall apply:

1) "*Use effectiveness*" or effectiveness "in actual use" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "*Encare*" means the vaginal contraceptive suppository product marketed under the tradename Encare or Encare Oval, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

3) "*Advertisement*" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; provided, however, that the term advertisement does not include material which solely refers to the product without making any claims for the product.

4) "*Product or use characteristic*" includes but is not limited to efficacy, safety or convenience.

I

It is ordered, That respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Encare which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product; unless respondent neither knew nor should have known that the representation was false, deceptive or misleading.

C. Representing, directly or by implication, that Encare has

novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; provided, however, that respondent may represent that Encare is effective or reliable or make other effectiveness claims as permitted by this Order (for example, "Encare provides reliable protection against pregnancy").

II

It is further ordered, That respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Encare:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, you should ask your doctor which contraceptive method, including Encare, is best for you.

C. Some Encare users experience irritation in using the product.

D. It is essential that you insert Encare at least ten minutes before intercourse.

E. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in type at least as large as the type face of the major portion of the text of the advertising copy. Disclosures D and E shall be separate and distinguishable from the main body of the advertisement for a period of 24 months following the date of service of this Order or 27 months from the date of signing of this Order, whichever expires earlier.

III

It is further ordered, That respondent make the following affirma-

tive disclosure in any consumer (lay) print advertisement for Encare in which any product or use characteristic of Encare is compared, directly or by implication, to any product or use characteristic of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD"):

Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the advertisement specified for Disclosure II.E.

IV

It is further ordered, That respondent make the following disclosures in any consumer (lay) TV advertisements for Encare:

A. Follow directions exactly, including the ten minute waiting period.

B. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure IV.A consistent with such reasonable basis.

V

It is further ordered, That respondent make the following disclosure in any consumer (lay) radio advertisements for Encare:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI

It is further ordered, That respondent shall make the following disclosures in ethical (professional) advertisements for Encare.

A. Irritation accompanies use of the product in some instances.

B. Encare must be inserted according to product instructions and at least ten minutes before intercourse.

C. Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same as or substantially similar to the language set forth above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the advertising copy.

VII

It is further ordered, That respondent cease and desist from:

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.

VIII

It is further ordered, That respondent maintain complete business records relative to the manner and form of its compliance with this Order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements; and documents which substantiate or contradict any claim made in advertising, promoting or selling the product. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

IX

It is further ordered, That respondent forthwith deliver a copy of this Order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Encare or in any aspect of the preparation, creation or placing of advertising for Encare on behalf of respondent. A statement acknowledging receipt of this Order shall be obtained in each case.

X

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporation which may affect compliance obligations arising out of this Order.

XI

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this Order, file with the Commission a report setting forth in detail the manner and form in which it has complied with this Order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

CITICORP FINANCIAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-3057. Complaint, April 18, 1973—Decision, March 4, 1981*

This consent order requires, among other things, a Towson, Md. financial organization to cease issuing any unsolicited credit card, except in renewal of or in substitution for an accepted credit card. Respondent is additionally required to maintain prescribed records for specified periods.

Appearances

For the Commission: *Frederick D. Clements.*

For the respondent: *Lucian C. Jones, Shearman & Sterling,* New York City.

DECISION AND ORDER

The Commission having heretofore issued its decision and order in Docket No. C-2383 in the matter of Arlen Realty & Development Corp., a corporation, also doing business as Korvettes, a division, and NAC Credit Corporation, a corporation, on April 18, 1973, which provides that said order shall apply to "successors and assigns" of said respondents; and

Citicorp Financial, Inc., having succeeded to a substantial part of the assets of NAC Credit Corporation, a corporate respondent in Docket No. C-2383, and to the management and operation of the NAC Charge Plan formerly managed and operated by NAC Credit Corporation; and

Citicorp Financial, Inc., and counsel for the Commission having executed an agreement containing a consent order, an admission by Citicorp Financial, Inc., of the jurisdiction of the Federal Trade Commission of the subject matter of this proceeding and of Citicorp Financial, Inc., as a successor of NAC Credit Corporation, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Citicorp Financial, Inc., that it has violated the law as alleged in the Arlen Realty & Development Corp., *et al.* Complaint (Docket No. C-2383),

* Complaint previously published at 82 F.T.C. 1234.

and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Citicorp Financial, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7720 York Road, Towson, Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

It is ordered, That respondent Citicorp Financial, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the issuance of credit cards, as "credit card" is defined in Regulation Z (12 CFR 226) of the Truth in Lending Act, as amended, (P.L. 90-321, 15 U.S.C. 1601, *et seq.*), shall forthwith cease and desist from:

Issuing any credit card, other than a credit card issued in renewal of or in substitution for an accepted credit card, as "accepted credit card" is defined in Section 226.13(a) of Regulation Z, unless:

1. In response to the recipient's separate signed, affirmative and specific written request or written application therefor.

Or

2. In response to the recipient's specific oral request obtained pursuant to oral solicitation, *provided,* that the following procedures are employed:

a) The person making the oral solicitation must state the following, or words of similar meaning and import, at the very outset of the conversation with the person being solicited:

The purpose of this telephone call [or conversation] is to find out if you would like to have a NAC [or other specific name, as applicable] credit card.

And

b) A detailed log of all oral solicitations is maintained for a period of at least two years, such log to include:

(1) The name of the individual who made the oral solicitation;
(2) The name of the person with whom the solicitor spoke;
(3) The time and date of the solicitation; and
(4) Whether or not a credit card was requested.

A. *It is further ordered,* That for a period of five (5) years from the date of entry of this order respondent shall:

1. Maintain records of all oral and written complaints it receives concerning its solicitation programs; provide those records to the staff of the Federal Trade Commission upon request; reflect in those records, in the case of each such oral complaint, the name and address of the complainant together with a brief identification of the nature of the complaint, and to include in those records, in the case of each such written complaint, a copy of the complaint.

2. Maintain a copy of each contract between it and any other party pursuant to which that party will solicit new holders for any credit card issued by Citicorp Financial, Inc., and to provide those copies to the staff of the Federal Trade Commission upon request.

3. Take steps to insure that a full consumer credit report on any applicant solicited during any new account solicitation program is not obtained by Citicorp Financial, Inc. (or by any person soliciting new accounts on behalf of Citicorp Financial, Inc.) during the period of time commencing on the date on which such applicant is first contacted, orally or in writing, by Citicorp Financial, Inc. (or by any person soliciting new accounts on behalf of Citicorp Financial, Inc.) and ending on the earlier of (i) the date on which the applicant submits a written request for the credit card or (ii) the date on which the applicant first uses the credit card.

B. *It is further ordered,* That respondent shall forthwith deliver a copy of this order to cease and desist to all persons engaged in the solicitation or issuance of respondent's credit cards, whether or not employed by respondent, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

C. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or

dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

D. *It is further ordered,* That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

GROLIER, INCORPORATED

Docket 8879. Interlocutory Order, March 10, 1981

ORDER GRANTING DISCOVERY IN PART; DENYING DISCOVERY IN PART AND "CLARIFYING" SEPTEMBER 12, 1980 ORDER

On September 12, 1980, we issued an order reopening this proceeding to comply with the mandate of the Court of Appeals for the Ninth Circuit in *Grolier, Inc.* v. *FTC*, 615 F.2d 1215 (9th Cir. 1980). On November 6, 1980,[1] respondent Grolier, Incorporated ("Grolier"), filed motions for discovery and "clarification" of our Order. The memorandum ("Resp. Memo.") accompanying the motions argued that the Commission had issued an order that "contradicts" the mandate of the Ninth Circuit (Resp. Memo. 6) and sought to justify extensive discovery. On November 26, 1980, complaint counsel filed an answer ("Answer"), with accompanying affidavits, which contends that additional discovery is not necessary. Finally, on December 22, 1980, Grolier filed a motion for leave to file a reply memorandum and a request for additional discovery.

Upon review it is difficult to escape the conclusion that Grolier's motion for "clarification" is largely designed to delay this proceeding. The only "clarification" sought is whether the September 12 Order requires "Grolier to follow a procedure different from what the Ninth Circuit mandated." Resp. Memo. at 6.[2] The answer is that it does not. As noted above, the Ninth Circuit's remand was premised on the fact that it believed Grolier was improperly denied any knowledge of Judge von Brand's prior participation in this case. The Court of Appeals, however, was unaware that an FOIA request, identical to Grolier's original discovery motion, had yielded all but 28 documents prior to remand. Our Order (Order at 2) invited the parties to comment on whether the release of those documents rendered the original discovery motion moot. Grolier chose not to comment. We, therefore, hold that, with our action today, Grolier's original discovery request for documents has been granted in its entirety. We do not believe the Court of Appeals intended the

[1] By the terms of the Commission's order of September 12, 1980, Grolier was allowed to renew its motion to disqualify Judge von Brand if it desired, and required to present the Commission with specified evidence on questions relevant to the motion by October 23, 1980. On September 29, 1980, Grolier sought additional time purportedly to review the documents it had possessed for several years by virtue of a FOIA request, before responding to the Commission's order.

[2] In seeking additional time on September 29, 1980, Grolier did not allude to any uncertainty as to what the Commission had ordered it to do and suggested to the Commission only that the additional time it requested was necessary to examine the documents it had received years ago under the FOIA, so that it could point to specific facts that demonstrated Judge von Brand should be disqualified.

Commission to elevate form over substance and search the same documents repeatedly[3] simply to provide them in formal response to Grolier's discovery motion. The documents Grolier has, and has had for some time,[4] along with the documents we make available by this order and the affidavits of Judge von Brand and former Commissioner MacIntyre should "adequately disclose the existence or nonexistence of ALJ von Brand's involvement in prior Grolier matters." *Grolier, Inc.* v. *FTC, supra,* 615 F.2d at 1222. Now, according to the Court of Appeals, "Grolier, who has the burden of proof on the disqualification issue, may rightfully be obligated *** to offer evidence contradicting the sworn statements of the [FTC] ***."[5] *Id.*

In its motion of November 6, 1980, Grolier seeks discovery beyond that which the Ninth Circuit ordered the Commission to consider. The requested discovery includes three depositions and ten categories of documents. Complaint counsel's Answer argues that most of this requested discovery will not shed light on the question of whether Judge von Brand was involved with information related to Grolier "received outside of the controlled adjudicative setting." 615 F.2d at 1220.

Complaint counsel has examined the remaining twenty-eight documents involved in Grolier's original request and not currently available to Grolier and states that none of the documents indicate they were "written, received or reviewed" by Judge von Brand. Affidavit of Edward B. Craig, IV. Complaint counsel also points out that a review of the Index to Documents[6] (Submission of Documents, Exhibit C) in the FOIA suit makes it clear that nothing in the withheld portions of the documents would reveal anything about Judge von Brand's involvement with Grolier matters while he was an attorney-advisor. For example, the segments excised from the six documents in category A are only staff recommendations or opinions which could not reveal Judge von Brand's involvement. The documents in category B (Commission circulations) could only reveal whether Commissioner MacIntyre circulated a matter. Similarly the documents in category C (assignment sheets) could only reveal that a

[3] The Commission searched its files two times at Grolier's request in the FOIA suit. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission of Documents"), Exhibits B and E. In addition, it responded to lengthy interrogatories from Grolier as to the nature of the Commission's record keeping systems. Submission of Documents, Exhibit D.

[4] Some of the documents were provided to Grolier as early as May 1976. As of June 1976, only 41 documents were being withheld and some of those were partially released. In March 1979, the Commission released all of its blue minutes to Grolier with minor deletions. Submission of Documents, Exhibits B and G.

[5] The Court of Appeals also would have allowed Grolier "to point out the inadequacy and inconsistency, if any, in the sworn statements" before it could subpoena documents. 615 F.2d at 122. Since this order and the FOIA response make available all the documents originally requested, this point is moot.

[6] The district court in the FOIA suit reviewed the documents *in camera* and found the documents were both accurately described in the Index and properly withheld. Submission of Documents, Exhibit F.

matter was assigned to Commissioner MacIntyre. Because the Ninth Circuit rejected Grolier's argument that Judge von Brand is chargeable with involvement in all matters before the Commission while an attorney-advisor, whatever Commissioner MacIntyre reviewed or did has little relevance to Judge von Brand's "actual involvement" with Grolier information. 615 F.2d at 1221. Moreover, Mr. MacIntyre has provided an affidavit in which he states that he divided work in his office between investigative matters and adjudicative matters and only assigned adjudicative matters to Judge von Brand. Answer, Exhibit A. Grolier also requests documents referred to in the blue minutes which the Commission has already released. But, Grolier already has four of these documents. Answer, p. 10. Two others involve requests by state attorneys general for access to information contained in the Grolier file and do not concern the merits of the investigation. Answer, p. 10 and Exhibit B. The final document referenced contains a typographical error in the blue minute and, in any event, was prepared after Judge von Brand ceased to serve as an attorney-advisor. The last category of documents (staff notes on conversations with Grolier personnel) would not have come to the attention of the Commission.

Although the arguments summarized above do strongly suggest that the 28 documents in question, by their nature, could not shed light upon ALJ von Brand's involvement with Grolier matters, and although the district court has ruled that the documents are properly withheld as privileged in the FOIA context, the Commission has determined, in the exercise of its discretion, to release these documents to Grolier.

Grolier's other discovery requests in the November 6, 1980, motion called for documents that do not exist or appear unnecessary, especially in view of Mr. MacIntyre's affidavit, and are denied.[7] Grolier has also filed a "reply" in support of its discovery motion and requested yet a fourth deposition. A reply is not normally permitted under our Rules (16 C.F.R. 3.22(c)). While we will grant leave to file the reply we deny the request for additional discovery. Grolier argues that Mr. MacIntyre's affidavit is at variance with Judge von Brand's affidavit and our previous opinions. But Grolier is factually incorrect.[8] More fundamentally, Grolier misconstrues the Ninth

[7] For example, several categories of documents sought concern items in Mr. MacIntyre's personal files. But Mr. MacIntyre states he has no such files relating to Grolier. Answer, Exhibit A. Other categories of documents sought involve all Commission cases in the relevant period that concerned encyclopedia sales or door-to-door sales on the ground they may be related cases because the same issues may be involved. This request is too sweeping and goes beyond the crucial question we must answer on disqualification, *i.e.*, the extent to which the challenged adjudicator (Judge von Brand) was actually involved in his former position "with the case he is deciding." 615 F.2d at 1221. See also *Kroger, Inc.*, Docket 9102, Order, June 5, 1980.

[8] There simply is no inconsistency between former Chairman Engman's perception that an attorney-advisor

(Continued)

Circuit's mandate to allow it endless discovery. The Ninth Circuit only required us to provide the documents Grolier requested if there were inconsistencies in the affidavits dealing with Judge von Brand's prior involvement. See note 5, *supra.* The Commission has now done this. Grolier has all the documents it originally requested; all the documents related to Grolier which came before the Commission while Judge von Brand served as an attorney advisor; the sworn statements of Judge von Brand and Commissioner MacIntyre that they cannot recall his involvement with, or knowledge of, Grolier matters while he was an attorney-advisor. This wealth of materials far exceeds that available in *R.A. Holman & Co.* v. *SEC,* 336 F.2d 446, 452–54 (2d Cir. 1966) (the case the Ninth Circuit relied upon in ordering us to consider further discovery). There the Court held that it was not improper to refuse to allow depositions of the individual allegedly disqualified and others, when the party seeking disqualification received a summary of the investigation and sworn statements that the individual did not have any "substantial knowledge of the facts in issue."

With the benefit of everything involving Grolier that was before the Commission during the period Judge von Brand served as an attorney advisor, Grolier must now present evidence of his "actual involvement" with the Grolier case and demonstrate with particularity, his involvement, with *ex parte* matters received outside the controlled adjudicative setting and relevant to facts in issue. (615 F.2d at 1220.) We expect Grolier to file a renewed disqualification motion "if it is appropriate" (Reply 1, n.1), conforming to our Order of September 12, 1980, no later than March 30, 1981.[9]

Therefore, it is ordered, That Grolier is granted leave to file its reply and Grolier's motion for discovery is granted insofar as it requests the twenty-eight documents withheld in the FOIA suit and denied in all other respects, and

It is further ordered, That complaint counsel, upon receipt of this

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"has access to the whole of his Commissioner's business," our statement that there is a "public perception that an attorney-advisor has some *** knowledge of all matters received the Commissioner's office," and Mr. MacIntyre's sworn statement that he compartmentalized the functions his advisors performed. First, what is at issue here is not a question of potential access or knowledge, but Judge von Brand's "actual involvement" with Grolier facts. 615 F.2d at 1221. Second, we are uniquely aware that each Commissioner has different office policies. Finally, and most important the Ninth Circuit specifically rejected the applicability of our clearance cases to the disqualification context by observing that Grolier's approach would produce an "unnecessarily unpractical approach." We do not see any inconsistency either in the fact that to the best of Mr. MacIntyre's recollection Judge von Brand "never saw or knew about" Grolier matters and Judge von Brand's statement that he could not recall such matters even though he could not "flatly rule out" the possibility.

[9] In view of the fact that Grolier has had virtually all the documents originally requested since 1976, the fact that Grolier previously led the Commission to believe it was examining those documents to comply with the Commission's order, and the fact that there are only 28 new documents to examine, an extension of time will be granted only in the most extraordinary circumstances.

order serve Grolier with unexcised copies of the twenty-eight documents withheld in the Grolier FOIA suit, and

It is further ordered, That Grolier, if it desires, file a renewed motion to disqualify Judge von Brand, addressing the issues specified in our Order of September 12, 1980, no later than March 30, 1981.

Commissioner Pitofsky did not participate.

In the Matter of

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, March 12, 1981

Denial of motions to disqualify Commissioner and dismiss complaint.

Order

On January 5, 1981, respondent filed a motion seeking recusal and alternatively, disqualification, of Commissioner Paul Rand Dixon based upon his public statement on April 23, 1980, which elucidated his reason for voting for the issuance of the complaint in this proceeding. On October 24, 1980, respondent had previously sought dismissal of the complaint from Administrative Law Judge Parker on the same basis. Although Judge Parker denied respondent's motion for dismissal and refused to certify this issue to the full Commission, respondent now seeks dismissal as a remedy from the Commission based upon Commissioner Dixon's statement. Complaint counsel seeks to have the motion returned to respondent "without Commission action" because Judge Parker had previously refused to certify the issue for Commission disposition.* On January 30, 1981, Commissioner Dixon placed a statement on the record in which he declined to recuse himself and stated his belief that it would be appropriate for the Commission to address the issue. On February 26, 1981, respondent filed a document denominated "Answer of Respondent Boise Cascade Corporation to Statement of Commissioner Dixon in Response to Motion for Recusal." The Commission has determined that respondent's motion should be denied.

We see no reason to disqualify Commissioner Dixon, since we do not believe that any bias, prejudgment or apparent unfairness has been demonstrated. *Cinderella Career & Finishing School, Inc.* v. *FTC,* 425 F.2d 583, 591 (D.C. Cir. 1970); *Amos Treat & Co.* v. *SEC,* 306 F.2d 260, 267 (D.C. Cir. 1962). Commissioner Dixon's statement, in context, was an official, on-the-record expression of his view that the statutory requirement that the Commission's complaint be based on "reason to believe" had been fulfilled. *Cf., FTC* v. *Standard Oil Co.,* 101 S.Ct. 488, 493–94, 496–97 n. 14 (1980); *FTC* v. *Cement Institute,* 333 U.S. 683, 700–03 (1948); *Duffield* v. *Charleston Area Medical Center,* 503 F.2d 512, 517–19 (4th Cir. 1974); *Pangburn* v. *CAB,* 311 F.2d 349, 356–58 (1st Cir. 1962). It is axiomatic that in determining

* The ALJ certified other claims presented in the motion to dismiss which will be treated in a separate order at a later date.

whether the Commission has "reason to believe" sufficient to issue a complaint, the Commissioners must be able to review information, gathered by the staff in the investigation, which may ultimately be offered in evidence in the adjudicative proceeding.

In his statement issued simultaneously with the complaint, Commissioner Dixon said, in pertinent part, "[F]rom my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation . . . ." Respondent contends that Commissioner Dixon's statement "shows that he has weighed the evidence and concluded before any trial that [respondent] is guilty." In particular, respondent argues that Commissioner Dixon should have said only that he had reason to believe there *may be* evidence sufficient to find a violation, not that he had reason to believe there *is* evidence sufficient to find a violation. Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), clearly provides, however, that the Commission may issue a complaint only when it has "reason to believe any . . . corporation *has been* or *is* using any unfair method of competition. . . . " (emphasis added). *See FTC* v. *Standard Oil Co.,* 101 S.Ct. 488, 493–94 (1980). Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), contains a parallel provision. We conclude there is no basis to disqualify Commissioner Dixon or to dismiss the complaint.

It is ordered, (1) That respondent's motion to disqualify Commissioner Dixon be, and hereby is, denied;

(2) That respondent's motion to dismiss the complaint based on the alleged prejudgment of Commissioner Dixon be, and hereby is, denied.

Commissioner Dixon not participating.

IN THE MATTER OF

JIM WALTER CORPORATION, ET AL.

Docket 8986. Interlocutory Order, March 13, 1981

Reopening proceedings on remand of the United States Court of Appeals.

ORDER

On September 12, 1980, the United States Court of Appeals for the Fifth Circuit vacated the Commission's Final Order in this matter and remanded the case for reconsideration in light of its findings. Upon expiration of the time for filing petitions for rehearing and for a writ of certiorari, the matter has returned to the jurisdiction of the Commission.

It is therefore ordered, That the proceeding be, and hereby is, reopened;

It is further ordered, That complaint counsel and respondent file briefs presenting their views as to further disposition of this matter.* The parties should address all issues relevant to the question whether further evidentiary hearings are warranted, including, but not limited to, the facts to be established in any future evidentiary hearings, the current market shares of the respondent and the other firms in this relevant product market, any relevant post-acquisition experience of respondent and other firms in this relevant product market, the court's findings with respect to the relevant geographic market, the public interest in further evidentiary hearings and the likelihood of effective relief.

Complaint counsel shall submit their brief within thirty days of the date of this Order, and respondent shall submit its brief within thirty days of the date of service of complaint counsel's brief. No other brief will be permitted without leave of the Commission. All briefs shall follow the form and page limitations set forth in Section 3.52(b), (c) and (e) of the Commission's Rules of Practice.

Commissioner Pertschuk not participating.

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* The briefs should be filed *in camera* initially. The Commission will thereafter request appropriate views of the parties, and determine which material should remain *in camera* in accordance with the standards in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961), *Bristol-Myers Company*, 90 F.T.C. 455 (1977) and *General Foods Corp.*, Docket No. 9085, Order of March 10, 1980.

IN THE MATTER OF

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, ET AL.

Docket 9000. Interlocutory Order, March 13, 1981

ORDER DENYING REQUEST FOR REIMBURSEMENT OF EXPENSES

By a brief filed with the Commission on September 29, 1980, Interstate Brands Corporation ("Interstate") seeks to appeal the denial by Administrative Law Judge Brown of its motion of July 24, 1980, for payment of costs incurred in the production of documents in response to a subpoena *duces tecum.* The subpoena, issued on September 19, 1979, at respondents' request as part of their deferred discovery of nonparties, called for the production of certain documents in Interstate's possession for inspection and copying by respondents. On October 4, 1979, Interstate filed a motion to quash the subpoena on several grounds. Limiting the subpoena somewhat, the ALJ otherwise denied the motion to quash on October 17, 1979. Interstate thereafter complied fully with the subpoena. On August 26, 1980, the ALJ denied Interstate's request for reimbursement of its costs of compliance, stating that "in [his] opinion, the Administrative Law Judge does not have authority to issue an enforceable order granting a money judgment against a respondent on behalf of a nonparty."*

Although Judge Brown's language is ambiguous, his order appears to state that while the Commission may exercise such authority in its discretion, the ALJ may not. If this holding was intended, then Interstate's motion of July 24 should have been certified under Section 3.22(a) of the Commission's Rules of Practice.[1] *See Crush International Limited,* 80 F.T.C. 1023, 1024 (1972). In view of the ambiguity, and in order to provide guidance to ALJs on the appropriate treatment of such reimbursement requests, the Commission will treat the present motion as having been certified.[2]

An ALJ does have the authority, in proper cases, to condition issuance of a subpoena upon an agreement to reimburse expenses of

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* Order Denying Motion of Interstate Brands Corporation for Compensation for the Production of Documents Subpoenaed as Part of Respondents Discovery, at 2.

[1] Rules of Practice Section 3.22(a) provides, in pertinent part:

"Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation where he deems it appropriate."

[2] In their response to the present motion, respondents correctly point out that Interstate has not requested or obtained certification of this question by the ALJ, a prerequisite to interlocutory Commission review of the ALJ's August 26, 1980, order under Rule 3.23(b) of the Commission's Rules of Practice. However, as discussed above, we shall treat the matter as properly before us under Rule 3.22(a).

compliance, or to deny a motion to quash on the condition that reimbursement be made. This authority is integral to the ALJ's general authority to "deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rules of Practice Section 3.31(c)(1). See also Fed. R. Civ. P. 45(b)(2).

The standards applicable to reimbursement requests in adjudicative proceedings are essentially the same as those previously announced by the Commission with respect to investigative subpoenas.[3] A subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable.[4] To determine whether expenses are "reasonable," the ALJ should compare the costs of compliance in relation to the size and resources of the subpoenaed party. See, *e.g.*, *SEC* v. *OKC Corp.*, 474 F.Supp. 1031 (N.D. Tex. 1979).

As to the timing of a subpoenaed party's request for reimbursement of costs of compliance, the Commission's Rules of Practice provide that a motion to quash or limit a subpoena in an adjudication "shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate argument, affidavits and other supporting documentation." Rules of Practice Section 3.34(c). A request for the costs of compliance based on the burdensomeness of the subpoena should be raised at the same time the subpoenaed party files its motion to quash with the ALJ, because a request for reimbursement must be predicated upon the "factual and legal objection" that the costs of compliance with the subpoena would be unreasonable. If the ALJ finds such an objection to be merited, he should require the proponent of the subpoena to cure the unreasonable burden, either by conditioning his denial of the motion to quash upon the proponent's agreement to reimburse the recipient so as to reduce compliance costs to a reasonable level,[5] or (absent such an agreement) by granting the motion to quash.

Of course, compliance costs may not be fully foreseen. A subpoena recipient may undertake compliance with a subpoena on the belief,

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[3] See Order Denying Motion to Reimburse Costs of Complying With Subpoena Duces Tecum, File No. 782 3078, August 31, 1979 (Creditors Service Bureau of El Paso, Inc.)

[4] See *SEC* v. *Arthur Young*, 504 F.2d 1013 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); see also *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129, 130 (2d Cir. 1967) (recipient of a summons has a duty of cooperation and at least up to some point must shoulder the financial burden of cooperation).

[5] The provision of the Operating Manual (Chap. 10, Section 13.6.4.7.8) relating to ALJ reimbursement orders and the proponent's obligation to tender payment, refers to this situation, in which the proponent obtains enforcement of its subpoena only because it agrees to reimburse the costs of compliance. Once the proponent elects to ameliorate the otherwise undue burden of its subpoena in this way, it is bound by that election.

which turns out to be incorrect, that the costs will be reasonable. Therefore, the ALJ should afford the producing party the opportunity, even after compliance begins, to file a motion for a protective order conditioning further compliance upon an agreement for reimbursement of anticipated costs. The producing party may be able to show that its experience with partial compliance reveals the unreasonableness of the costs of remaining compliance. If so, the ALJ may act to relieve the undue burden in either of the ways available to him were a motion to quash filed: by conditioning further compliance upon the proponent's agreement to reimburse such compliance costs, or, if the subpoena proponent will not agree, by terminating the obligation for further compliance.

However, requests for reimbursement for compliance costs already incurred are untimely and inconsistent with the Commission's rules, because they deprive the ALJ and the proponent of the subpoena of the choice of means by which to ameliorate unreasonable burdens.

Interstate did not request reimbursement in its motion to quash, nor did it do so at any time during compliance. It suggests that the extent of its expenses could only be known after compliance. Brief at 4. Perhaps the exact dollar amounts could only be known after the fact, but we cannot credit the contention that Interstate was incapable of bringing to the ALJ's attention a reasonable approximation of anticipated expenses prior to their being incurred. Accordingly, Interstate's after-the-fact request is denied as untimely.

It is ordered, That Interstate's request for reimbursement be denied in light of the standards set out in this order.

In the Matter of

SORGA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3058. Complaint, March 13, 1981—Decision, March 13, 1981.

This consent order requires, among other things, a New York City advertising agency to cease, in connection with the advertising and sale of Semicid, or similar over-the-counter vaginal contraceptive suppository products, misrepresenting or failing to substantiate claims relating to the product's effectiveness, safety and performance characteristics. The firm is further prohibited from disseminating advertisements using performance or quality heightening modifiers such as "highly" or "extremely," in conjunction with words like "effective" or "reliable." Additionally, the order requires the company to disclose, in print, radio and TV consumer advertising, certain facts material to contraceptive suppository use; and to maintain business records for a period of three years.

Appearances

For the Commission: *Shirley F. Sarna* and *Paula K. Stein.*

For the respondent: *Evan A. Davis, Clearly, Gottlieb, Steen & Hamilton,* New York City.

Complaint

The Federal Trade Commission, having reason to believe that Sorga, Inc., a corporation, (hereinafter "respondent") has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Paragraph 1. Sorga, Inc. is a New York corporation with its principal place of business at 300 East 42nd St., New York, New York. Sorga, Inc. previously did business under the name of Kelly, Nason-Univas, Inc. The name change to Sorga, Inc. was accomplished by amendment to the certificate of incorporation on June 29, 1979.

Allegations stated in the present tense include the past tense.

Par. 2. For purposes of this complaint the following definitions shall apply:

1. A "*vaginal contraceptive suppository*" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus.

Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

2. "*Use effectiveness*" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately nor use the contraceptive method each time they have sexual relations.

3. "*Commerce*" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent was an advertising agency for American Home Products Corporation. In such capacity respondent has prepared and placed advertising for publication and has caused dissemination of advertising, including the advertising referred to herein, to promote the sale of a vaginal contraceptive suppository product named "Semicid", a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business respondent has disseminated or caused the dissemination of certain advertisements concerning Semicid (1) by United States mail, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio and television broadcasts of interstate transmission, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Semicid, or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Semicid in or having an effect upon commerce.

PAR. 5. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondent's advertisements, but not all inclusive thereof, are the advertisements identified as Attachments 1 through 4.

PAR. 6. Through the use of such advertisements, and others not specifically set forth herein, respondent represents, directly or by implication, that:

1. Semicid has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").

2. Semicid has novel contraceptive performance characteristics.

PAR. 7. In truth and in fact:

1. Semicid's use effectiveness is approximately that of other

vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.

2. Semicid does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertisements and representations referred to in Paragraphs Five and Six are false, deceptive or misleading.

PAR. 8. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondent represents, directly or by implication, that:

1. Semicid has an extremely high use effectiveness.
2. Semicid has novel contraceptive performance characteristics.
3. Semicid has been scientifically or medically proven to have an extremely high use effectiveness.

PAR. 9. At the time respondent made the representations alleged in Paragraph Eight, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 10. Furthermore, respondent advertises Semicid without disclosing to the purchasing public through its advertising that:

1. For best protection against pregnancy, it is essential that one follow instructions.
2. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
3. Some Semicid users experience irritation.
4. Semicid requires a waiting period of fifteen minutes before intercourse to ensure effectiveness.
5. Semicid is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 11. The facts described in Paragraph Ten are material with respect to the consequences which may result from use of Semicid as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertisements referred to in Paragraphs Four and Five false, deceptive or misleading.

PAR. 12. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondent, directly or by

implication, favorably compares some characteristics of Semicid to the pill or the IUD and represents in the same advertisements that Semicid has an extremely high use effectiveness. Favorable comparison of Semicid to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Semicid's use effectiveness is equal to that of the pill or IUD. Respondent fails to disclose the fact that Semicid has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 13. The fact described in Paragraph Twelve is material in light of the comparative representations made in respondent's advertisements. Respondent's failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Four and Five false, misleading or unfair.

PAR. 14. In the course and conduct of its business, and at all times mentioned herein, respondent is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of services of the same general kind and nature as are sold by respondent.

PAR. 15. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices, and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent as herein alleged, including the dissemination of false advertising, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.

Now you can say goodbye to the pill, the IUD, diaphragms, foams, creams and douche jellies.

Semicid

PREVENTION OF PREGNANCY

Semicid

10 SUPPOSITORIES

Semicid is here.

A medically tested, vaginal contraceptive suppository developed for the woman of today.

As a contemporary woman, you know about birth control. You know what works, what feels right, what is aesthetically pleasing.

Whatever method you choose, you want it to be effective, safe and easy to use.

Now there's a non-hormonal contraceptive to satisfy your contemporary needs. Semicid.

Proven to be effective.

Semicid is an effective vaginal contraceptive for the prevention of pregnancy. It is a non-hormonal, vaginal mini-suppository that safely kills sperm in seconds. Semicid's active ingredient is nonoxynol-9, a spermicide used effectively by millions of women for over 10 years.

Laboratory tested. Doctor tested.

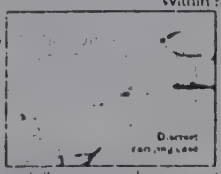
A U.S. clinical study of hundreds of women of childbearing age over a four year period, proved Semicid's high degree of effectiveness. This study was conducted by a gynecologist and was carefully [illegible] In comparing the findings of this study with published reports of other contraceptive methods, Semicid is shown to be effective in the prevention of pregnancy.

Semicid is safe.

Semicid contains no hormones. As a result, none can enter your bloodstream. What is more, Semicid is safer than the IUD, because it cannot pierce the uterine walls. Semicid is so safe that you can purchase it without a prescription, and it is non-irritating based on reports from doctors and from women using the product.

Easy and convenient to use.

Within minutes, Semicid dissolves and spreads a protective covering over the cervical opening and adjoining vaginal walls. And because Semicid is quick and easy to insert, it will not interfere with spontaneity.



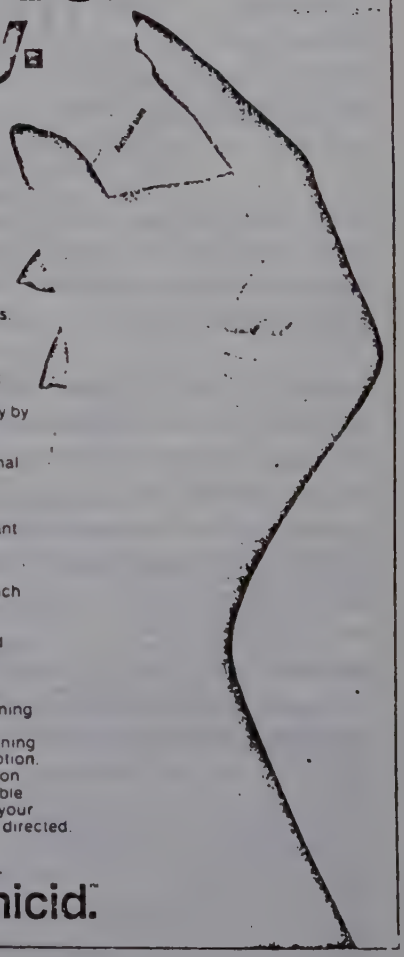
The Semicid package is so small and discreet that it can be kept anywhere. Semicid has no applicator, so there is nothing to fill, clean or remove.

Semicid is lubricating and has no unpleasant taste or odor. It was formulated for the kind life you are living today. Ask your doctor about it.

Semicid is from Whitehall Laboratories, one of the world's leading pharmaceutical companies. It's available at your local drugstore. Use only as directed.

SEMICID. Today's contraceptive for today's woman.

Now. A safe, simple way to prevent pregnancy.



It's Semicid, a safe, easy-to-use vaginal contraceptive suppository with an active ingredient proven effective by millions of women.

If you're dissatisfied with your present birth control method, you should know about Semicid, a real alternative in contraception from Whitehall Laboratories, one of the world's leading pharmaceutical companies.

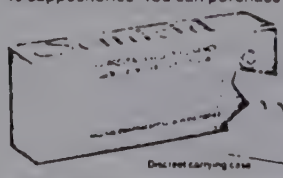
Semicid is safe and effective. It contains the maximum allowable level of nonoxynol-9, an ingredient which safely kills sperm in seconds. It's the spermicide doctors recommend most and has been used effectively by millions of women for over 10 years. Now this tested, proven ingredient is available in Semicid.

Semicid is safe, too. Unlike the pill, it has no hormonal side effects. And unlike the IUD, it can't damage uterine walls. Furthermore, Semicid does not effervesce the way the other vaginal suppository does. Semicid is non-irritating to most women. There's also no unpleasant odor. Neither you nor your partner will notice Semicid is there at all.

Semicid is neat and convenient. Slim, only an inch long, Semicid is so simple and easy to use. There's no applicator, so there's nothing to fill, clean, or remove. Semicid is not messy like foams, creams and jellies. And it's not awkward like the diaphragm. It lets love-making happen naturally, spontaneously.

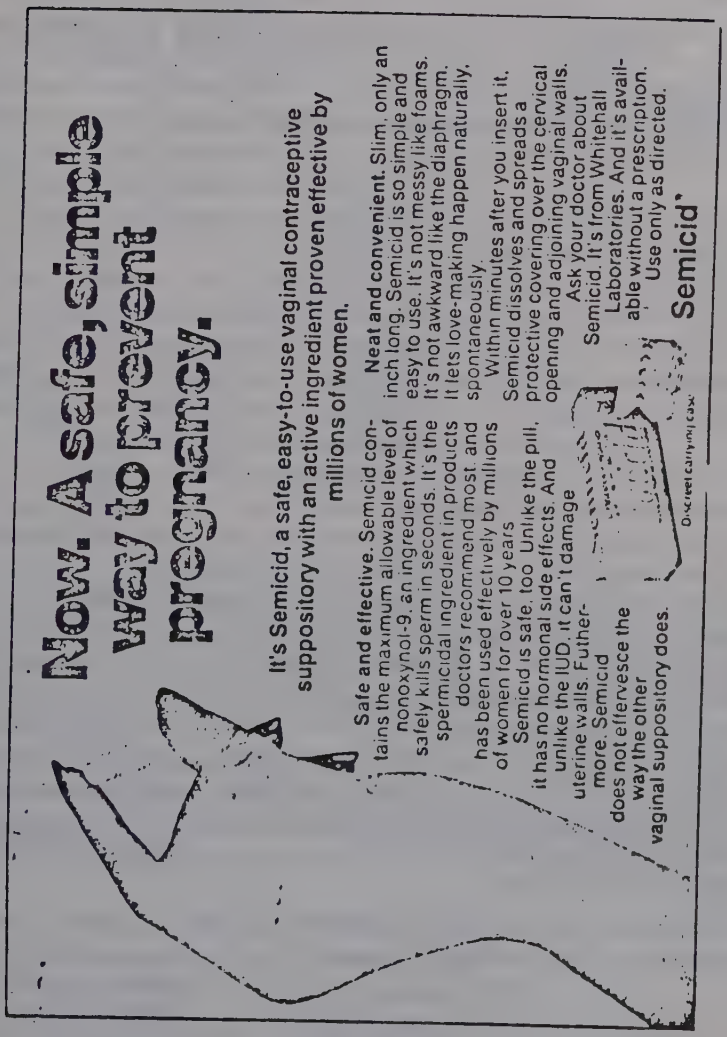
Within minutes after you insert it, Semicid dissolves and spreads a protective covering over the cervical opening and adjoining vaginal walls.

Semicid comes in a small, discreet dispenser containing 10 suppositories. You can purchase it without a prescription.



For more information about this remarkable contraceptive, ask your doctor. Use only as directed.

Semicid.™


Now. A safe, simple way to prevent pregnancy.
It's Semicid, a safe, easy-to-use vaginal contraceptive suppository with an active ingredient proven effective by millions of women.
Safe and effective. Semicid contains the maximum allowable level of nonoxynol-9, an ingredient which safely kills sperm in seconds. It's the spermicidal ingredient in products doctors recommend most, and has been used effectively by millions of women for over 10 years.
Semicid is safe, too. Unlike the pill, it has no hormonal side effects. And unlike the IUD, it can't damage uterine walls. Furthermore, Semicid does not effervesce the way the other vaginal suppository does.
Neat and convenient. Slim, only an inch long, Semicid is so simple and easy to use. It's not messy like foams. It's not awkward like the diaphragm. It lets love-making happen naturally, spontaneously.
Within minutes after you insert it, Semicid dissolves and spreads a protective covering over the cervical opening and adjoining vaginal walls.
Ask your doctor about Semicid. It's from Whitehall Laboratories. And it's available without a prescription.
Use only as directed.
Semicid®

"It's birth control on my terms. Semicid."

I've always felt birth control was *my* responsibility. (After all, it's *my* body.) And there are certain things I *expect* from a contraceptive: it has to be safe, uncomplicated and...effective.

That's why I choose Semicid. It's a slim, inch-long vaginal suppository. It's easy to insert, has no hormonal side effects, and is highly effective.

I trust it to prevent pregnancy. Semicid contains the contraceptive ingredient used effectively by millions of women for over 10 years. That gives me confidence. What's more, this ingredient is the one in products doctors recommend most, and it safely kills sperm in seconds.

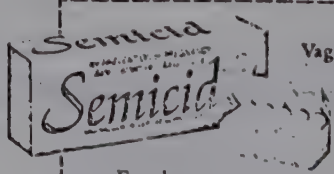
No hormonal side effects for me. I won't take a chance with the Pill, or the IUD. I want a contraceptive that's safe. Semicid *is*. It contains no hormones. And it doesn't effervesce like the other vaginal suppository. Semicid is not irritating to most women. I like that.

It doesn't interrupt the mood. The last thing I want is a contraceptive that's awkward. (I know myself: it *has* to be easy to use.) I don't want anything drippy. Or anything that smells or tastes unpleasant.

That's why Semicid's for me. It's neat *and* it gives me all the contraceptive protection I need. Within minutes after I insert it, Semicid dissolves and forms a protective barrier over the cervical opening and adjoining vaginal walls. This protection lasts for an hour.

It's portable, too. Semicid comes in a tiny carrying case of 10 suppositories. It's available at your local drug or food store *without* a prescription.

Ask your doctor about Semicid. You, too, may discover it's birth control on *your* terms.



Trial offer from Semicid Vaginal Contraceptive Suppositories.

Please send me a sample pack. Sample will be discreetly wrapped. Clip entire coupon and send with 50¢ (in check or money order) for postage and handling to:
Whitehall Laboratories, Inc., 685 Third Avenue, N.Y., NY 10017. Att: Semicid.

For the woman who's got everything under control.

Name _____
Address _____
City _____ State _____ Zip _____

This offer is made available to persons over 18 years of age. Subject to state and local regulations. Offer void in the State of [illegible] and where taxed, restricted or prohibited by law. Offer expires September 30, [illegible]. Canada only [illegible]

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sorga, Inc. is a New York corporation with its principal place of business at 300 East 42nd St., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

This Order applies to respondent Sorga, Inc., its successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with respondent's advertising, offering for sale, sale or distribution of Semicid or any OTC (over-the-counter) contraceptive product in or affecting commerce within the United States, including

the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this Order are not intended to set a standard for drug products other than OTC contraceptives.

For purposes of this Order, the following definitions shall apply:

1) "*Use effectiveness*" or effectiveness "*in actual use*" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "*Method effectiveness*" means that level of effectiveness which is attained in a well-controlled clinical trial utilizing highly motivated volunteers who reportedly use the contraceptive method correctly with every act of sexual intercourse.

3) "*Semicid*" means the vaginal contraceptive suppository product marketed under the tradename Semicid, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

4) "*Advertisement*" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; *provided, however,* that the term advertisement does not include material which solely refers to the product without making any claims for the product.

5) "*Product or use characteristic*" includes but is not limited to efficacy, safety or convenience.

I

It is ordered, That respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Semicid which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness

of any OTC contraceptive product; unless respondent neither knew nor should have known that the representation was false, deceptive or misleading.

C. Representing, directly or by implication, that Semicid has novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Representing, directly or by implication, the results of any study of method effectiveness of any OTC contraceptive product as a measure of the use effectiveness of any such product.

E. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; *provided, however,* that respondent may represent that Semicid is effective or reliable or make other effectiveness claims as permitted by this Order (for example, "Semicid provides reliable protection against pregnancy").

II

It is further ordered, That respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Semicid:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, ask your doctor if you can use Semicid.

C. Some Semicid users experience irritation in using the product.

D. It is essential that you insert Semicid at least fifteen minutes before intercourse.

E. Semicid is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "fifteen minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in typeface at least as large as the typeface of the major portion of the text of the advertising copy. Disclosures D and E shall be separate and distinguishable from the main body of the advertisement for a period of 24 months following the date of service of this

Order or 27 months from the date of signing of this Order, whichever expires earlier.

III

It is further ordered, That respondent make the following affirmative disclosure in any consumer (lay) print advertisement for Semicid in which any product or use characteristic of Semicid is compared, directly or by implication, to any product or use characteristic of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD"):

Semicid is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

Semicid is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the advertisement specified for Disclosure II.E.

IV

It is further ordered, That respondent make the following disclosures in any consumer (lay) TV advertisements for Semicid:

A. Follow directions exactly, including the fifteen minute waiting period.

B. Approximately as effective as contraceptive foams.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "fifteen minutes" in Disclosure A consistent with such reasonable basis.

V

It is further ordered, That respondent make the following disclosure in any consumer (lay) radio advertisements for Semicid:

Semicid's effectiveness is approximately equal to contraceptive foams.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI

It is further ordered, That respondent shall make the following disclosures in ethical (professional) advertisements for Semicid:

A. Irritation accompanies use of the product in some instances.

B. Semicid must be inserted according to product instructions and at least fifteen minutes before intercourse.

C. Semicid is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

OR

Semicid is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same or substantially similar to the language set forth above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "fifteen minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the advertising copy.

VII

It is further ordered, That respondent cease and desist from:

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I.A-D of this Order or fails to include any of the disclosures required by this Order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Semicid or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the

representations prohibited in Paragraph I.A-D of this Order or fails to include any of the disclosures required by this Order.

VIII

It is further ordered, That in advertisements in languages other than English, exact language disclosures required by this Order shall be made in the non-English language equivalent and convey the same meaning as the English language disclosures.

IX

It is further ordered, That respondent maintain complete business records relative to the manner and form of its compliance with this order. Such records shall include but not be limited to, copies of and dissemination schedules for all advertisements and documents which substantiate or contradict any claim made in advertising, promoting or selling the product. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

X

It is further ordered, That respondent forthwith deliver a copy of this Order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Semicid or in any aspect of the preparation, creation or placing of advertising for Semicid on behalf of respondent. A statement acknowledging receipt of this Order shall be obtained in each case.

XI

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in a corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporation which may affect compliance obligations arising out of this Order.

XII

It is further ordered, That respondent shall, within sixty (60) days

after service upon it of this Order, file with the Commission a report setting forth in detail the manner and form in which it has complied with this Order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

TED BATES & COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3059. Complaint, March 17, 1981—Decision, March 17, 1981

This consent order requires, among other things, a New York City advertising agency to cease referring to any test or survey of "experts" or "consumers" when making representations regarding the performance, benefit, choice or superiority of a product, unless the referenced test or survey has been scientifically designed, executed and evaluated by experts; and provides substantiation for the representations. The firm is further barred from representing, by reference to a test or survey, that experts or consumers surveyed or tested recommended or used a particular brand of product, without disclosing that an equal or greater percentage of such respondents had not indicated any brand preferences. Additionally, the order requires the company to maintain, for a period of three years, records substantiating advertising claims.

Appearances

For the Commission: *Mitchell Paul* and *Julie Niemasik.*

For the respondent: *Elhanan C. Stone,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ted Bates & Company, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ted Bates & Company, Inc. ("Ted Bates") is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 1515 Broadway, New York, New York.

PAR. 2. Respondent Ted Bates was for some time an advertising agency of Standard Brands, Inc. ("Standard Brands") and prepared and placed for publication and caused the dissemination of advertising material, including but not limited to the advertising referred to

herein, to promote the sale of Standard Brands' "Fleischmann's Margarine" products.

PAR. 3. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements concerning "Fleischmann's Margarine" products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, by means of advertisements printed in magazines and newspapers distributed by the mail and across state lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said "Fleischmann's Margarine" products.

PAR. 4. Among the advertisements so disseminated or caused to be disseminated by respondent are the advertisements attached as Exhibits A through D hereof.

PAR. 5. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent has represented directly or by implication that:

a) When a doctor chooses margarine, chances are it's Fleischmann's;

b) Twice as many doctors recommend Fleischmann's margarine as any other brand of margarine;

c) Twice as many doctors personally use Fleischmann's margarine as any other brand of margarine;

d) Twice as many doctors recommend and personally use Fleischmann's as any other brand of margarine;

e) Every 15 seconds a doctor recommends Fleischmann's margarine.

PAR. 6. In Exhibits A through D and others substantially similar thereto, respondent has represented directly or by implication that a survey of doctors proves the representations in Paragraph Five above.

PAR. 7. In Exhibits C and D and others substantially similar thereto, disseminated as aforesaid, respondent has represented directly or by implication that:

a) Of those doctors who recommend a polyunsaturated margarine, twice as many recommend Fleischmann's as any other brand of margarine;

b) Of those doctors who recommend a polyunsaturated margarine,

twice as many personally use Fleischmann's as any other brand of margarine;

c) Of those doctors who recommend a polyunsaturated margarine, twice as many recommend and personally use Fleischmann's as any other brand of margarine.

PAR. 8. In Exhibits C and D and others substantially similar thereto, respondent has represented directly or by implication that the aforementioned survey proves the representations in Paragraph Seven above.

PAR. 9. In truth and in fact, the aforementioned survey, conducted for Standard Brands by William Douglas McAdams, Inc. and entitled "Marketing Insights Into Physicians' Attitudes and Opinions Concerning Lipids and Cardiovascular Disease (General Medicine)" (hereinafter referred to as the "McAdams survey"), does not prove the representations in Paragraphs Five and Seven for reasons including but not limited to the following:

a) Of those survey respondents who were asked the question, "Which brand(s) of margarine do you recommend?", most (84.5%) did not state that they recommended Fleischmann's margarine;

b) Of those survey respondents who were asked the question, "Which brand(s) of margarine do you recommend?", most (at least 67.5%) did not recommend a specific name brand of margarine;

c) Of those survey respondents who were asked the question, "Do you use margarine at home? If yes: Which brand?", most (82.2%) did not state that they personally used Fleischmann's margarine;

d) Of those survey respondents who were asked the question, "Do you use a margarine at home? If yes: Which brand?", nearly one-half (47.1%) did not state that they used margarine or were unaware of the specific name brand of the margarine they personally used;

e) The survey respondents neither were asked nor stated the frequency of their recommendations of Fleischmann's margarine to their patients or to anyone else.

Therefore, the representations referred to in Paragraphs Six and Eight were and are unfair and deceptive.

PAR. 10. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent represented directly or by implication that, in responding to the survey, respondents had used their medical expertise in recommending, using, or choosing Fleischmann's Margarine.

PAR. 11. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent represented directly

or by implication that it possessed and relied upon a reasonable basis for the representations in Paragraphs Five, Six, Seven, Eight and Ten at the time of their initial and each subsequent dissemination.

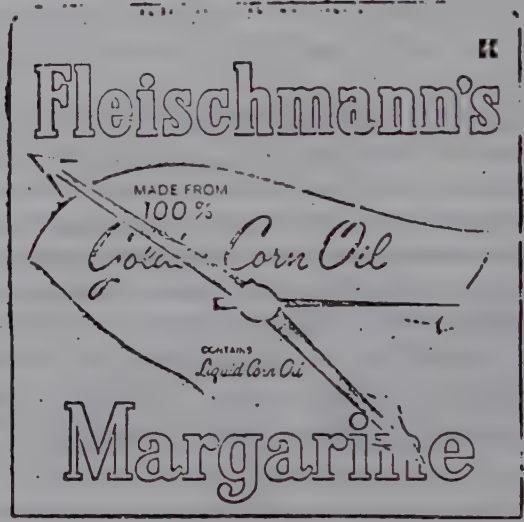
PAR. 12. In truth and in fact, respondent did not possess or rely upon a reasonable basis for the representations in Paragraphs Five, Six, Seven, Eight and Ten at the time of their initial and each subsequent dissemination. Therefore, such representations were and are unfair and deceptive.

PAR. 13. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Ted Bates has been, and now is, in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, with other advertising agencies.

PAR. 14. The use by respondent of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of Fleischmann's margarine manufactured by Standard Brands.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Every 15 seconds a doctor recommends Fleischmann's Margarine



Somewhere right about now a doctor is telling a patient to watch his cholesterol and advising him to eat sensibly. And one product he may recommend is Fleischmann's Margarine. A recent survey shows that twice as many doctors recommend Fleischmann's as any other margarine. In fact, based on the frequency with which those doctors make a recommendation, a doctor somewhere is recommending Fleischmann's Margarine every 15 seconds.

Many of those same doctors practice what they preach. The survey also showed twice as many doctors personally use Fleischmann's at home.

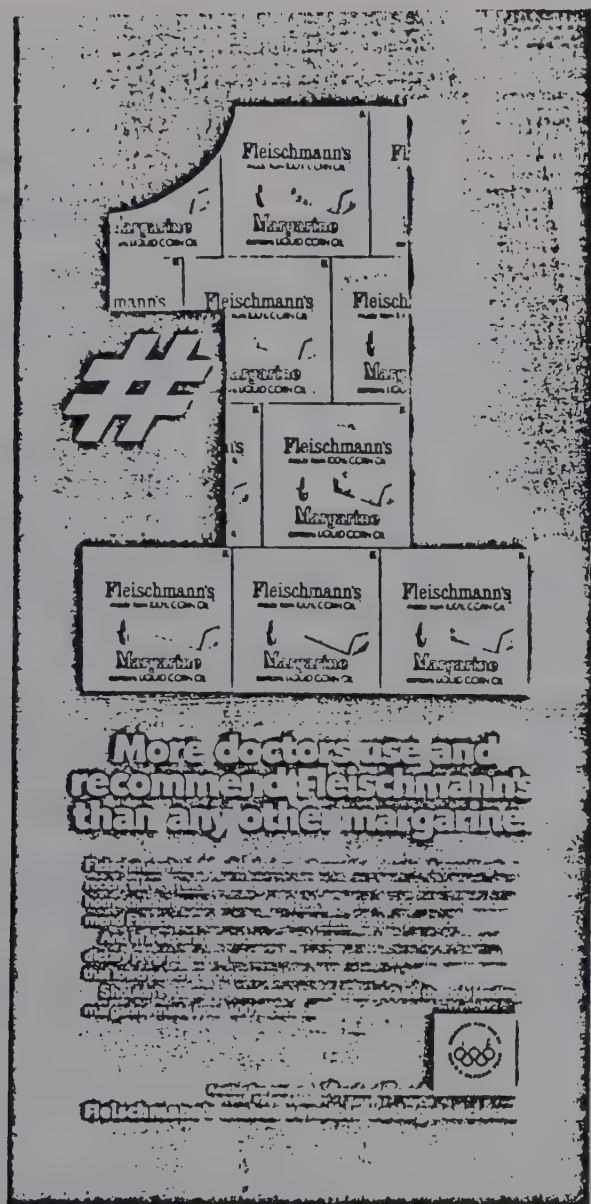
Fleischmann's is the only leading margarine made from 100% corn oil. Fleischmann's was part of a clinical test that lowered serum cholesterol levels an average 17%. In that test Fleischmann's was part of a total dietary program along with reduced fats, fewer eggs and skim milk.

Many doctors also recommend Egg Beaters.® Fleischmann's fresh-frozen, cholesterol-free egg substitute. With Egg Beaters instead of two eggs for breakfast you can save 450 mgs. of cholesterol and still enjoy the good taste of eggs. Can you afford not to serve your family Fleischmann's?

Two products of Standard Brands

Fleischmann's makes sensible eating delicious.

FLA 5525


Fleischmann's
Margarine
More doctors use and recommend Fleischmann's than any other margarine.

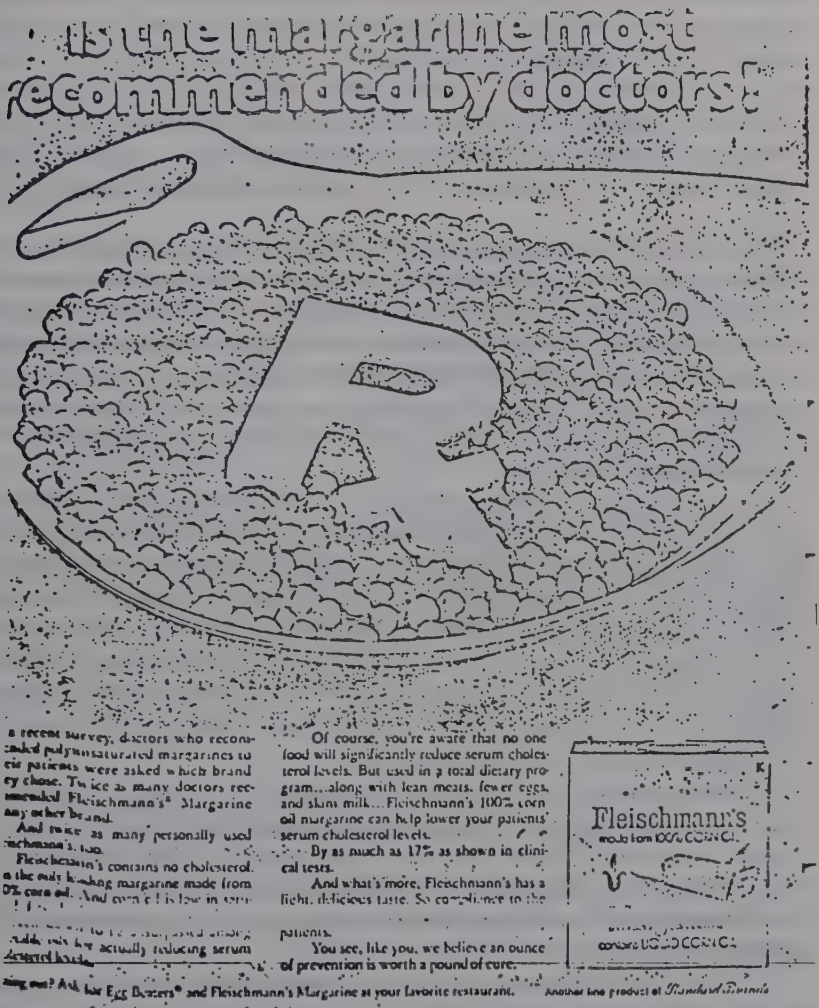
'When a doctor chooses margarine, chances are it's Fleischmann's.'

A recent survey of doctors who believe cholesterol levels can be lowered through a total dietary program proved they practice what they preach! Of those doctors who recommend a poly unsaturated margarine to their patients, twice as many recommend and personally use Fleischmann's as any other brand.

If that doesn't make you reach for Fleischmann's when you shop, remember it's the only leading margarine made from 100% corn oil, as high in polyunsaturates and low in saturated fats. Fleischmann's is ideal in a total dietary program designed to lower serum cholesterol. Clinical tests show liquid corn oil is unsurpassed among vegetable oils for lowering serum cholesterol. And 100% corn oil means light, delicious flavor your family will love. Serve your family the margarine more doctors use.

Fleischmann's

Another fine product of Standard Brands


is the margarine most
recommended by doctors?
a recent survey, doctors who recommended polyunsaturated margarines to their patients were asked which brand they chose. Twice as many doctors recommended Fleischmann's® Margarine any other brand.
And twice as many personally used Fleischmann's, too.
Fleischmann's contains no cholesterol. It is the only leading margarine made from 100% corn oil. And corn oil is low in serum
Of course, you're aware that no one food will significantly reduce serum cholesterol levels. But used in a total dietary program...along with lean meats, fewer eggs, and skim milk... Fleischmann's 100% corn oil margarine can help lower your patients' serum cholesterol levels.
By as much as 17% as shown in clinical tests.
And what's more, Fleischmann's has a light, delicious taste. So compliance to the patients.
You see, like you, we believe an ounce of prevention is worth a pound of cure.
Fleischmann's
made from 100% CORN OIL
contains NO CHOLESTEROL
Another fine product of Standard Brands
FLM 1312 — EXHIBIT D

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ted Bates & Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 1515 Broadway, New York, New York. Ted Bates/New York Division is the sole operating division of Ted Bates & Company, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondent Ted Bates & Company, Inc., a corporation (hereinafter referred to as respondent) and its successors, assigns, officers, agents, representatives and employees, direct-

ly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, of any product whose advertising account is: (1) currently or in the future assigned to Ted Bates/New York Division; or (2) currently or in the future assigned to Ted Bates/New York Division and is transferred from Ted Bates/New York Division to any subsidiary of Ted Bates & Company, Inc., do forthwith cease and desist from:

1. Making representations, directly or by implication, by reference to a survey or test of "experts" or "consumers" (as hereinafter defined in Part II of this Order), or the results thereof, concerning the performance or any characteristic, benefit, recommendation, usage or choice of or other preference for such Product, unless:

(a) such survey or test of experts or consumers is designed, executed and analyzed in a competent and reliable scientific manner; and

(b) such survey or test of experts or consumers substantiates the claim(s) represented by providing a reasonable basis therefor; and

(c) in regard to any claims of superiority based thereon, such survey test of experts or consumers establishes that such Product is superior to each compared product in respect to which the specific representation is made to a degree that will be discernible to or of benefit to consumers or potential consumers to whom the representation is directed.

2. Representing, directly or by implication, by reference to a survey or test that experts or consumers surveyed or tested:

(a) recommend such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents do not recommend a specific brand of the product, without disclosing such fact(s); or

(b) use such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents do not use a specific brand of the product, without disclosing such fact(s); or

(c) use such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents are not aware of the specific brand of the product which they do use, without disclosing such fact(s).

3. Representing, directly or by implication, by reference to a

survey or test of experts, that experts recommend, use, choose, or otherwise prefer such Product in any respect unless:

(a) such experts in fact possess the expertise to evaluate such Product with respect to such representation; and

(b) such experts actually exercised their expertise by evaluating or testing such Product, and based their stated preferences, findings, or opinions on such exercise of their expertise; and

(c) such representation, to the extent it expresses or implies a product comparison, is supported by an actual comparative evaluation or test by such experts; and

(d) such representation, to the extent it expresses or implies that such Product is superior to competing products, is supported by an actual comparative evaluation or test by such experts and by a conclusion therefrom that such Product is superior in fact to the competing products with respect to the feature(s) so represented as compared.

4. Representing, directly or by implication, by reference to a survey or test of consumers that consumers recommend, use, choose, or otherwise prefer such Product in any respect unless and only to the extent that respondent has a reasonable basis for such representation. A reasonable basis shall consist of any competent and reliable evidence which substantiates a statement or representation.

5. Failing to maintain records

(a) which provided the basis upon which respondent relied at the time of the initial and each subsequent dissemination of the claim; and

(b) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

Part II

For purposes of this Order, each of the terms listed below is defined as follows:

1. The term *experts* shall be deemed to be an individual(s), group(s) or institution(s), possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

2. The term *consumers* shall be deemed to be any person(s) who is a user or potential user of the product.

3. An advertising claim which is a personal endorsement of a product reflecting solely the subjective opinion of the endorser shall not be deemed to be a test.

Part III

It shall be an affirmative defense to any compliance action brought pursuant to this Order alleging that an advertisement was, in whole or in part, unsubstantiated, or not supported by a reasonable basis, for respondent to show that, prior to disseminating an advertisement containing a statement or representation challenged in such compliance action, respondent submitted to its client in writing all the claims which it reasonably believed were contained in the advertising prepared by it and exercised due care to assure itself that the advertiser possessed and relied upon a reasonable basis for those claims.

It shall be an affirmative defense to any compliance action brought pursuant to this Order alleging that an advertisement was, in whole or in part, false, misleading or deceptive, for respondent to show that, prior to disseminating an advertisement containing a statement or representation challenged in such compliance action, respondent submitted to its client in writing all the claims which it reasonably believed were contained in the advertising prepared by it and exercised due care to assure itself that those claims were neither false, misleading nor deceptive when placed by respondent.

Provided, however, that nothing in this Order shall be deemed to deny or limit respondent with respect to any other right, defense, or other affirmative defense to which respondent may otherwise be entitled by law in such compliance action or any other action; nor shall any inference adverse to respondent be drawn in any case from its failure to invoke this paragraph or to rely on the procedures provided herein.

It is further ordered, That respondent shall, within 60 days after service upon it of this Order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this Order.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to the senior executive officer of each account assigned to respondent's Ted Bates/New York Division and the executive in charge of research for such Division.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a

successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

In the Matter of

STANDARD BRANDS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3060. Complaint, March 17, 1981—Decision, March 17, 1981

This consent order requires, among other things, a New York City manufacturer of various products, including "Fleischmann's Margarine" products, to cease referring to any test or survey when making representations regarding the performance, benefit, choice or superiority of a product, unless referenced test or survey has been scientifically designed, executed and analyzed; and provides substantiation for those claims. The firm is further barred from representing that survey respondents recommend or use a particular brand of product more often than a competitive brand, unless the company discloses the fact that an equal or greater percentage of such respondents have no brand preference. Additionally, the order requires the firm to maintain, for a period of three years, records substantiating advertising claims.

Appearances

For the Commission: *Mitchell Paul* and *Julie Niemasik.*

For the respondent: *C. Henry Freas, Jr.,* in-house counsel.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Standard Brands, Inc., a corporation hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Standard Brands, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 625 Madison Ave., New York, New York.

Par. 2. Standard Brands, Inc. is now, and for some time in the past has been, engaged in the manufacture, distribution, advertising and sale of various products, including "Fleischmann's Margarine" products.

Par. 3. Respondent Standard Brands causes the said products, when sold, to be transported from its place of business in various

States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent Standard Brands maintains, and at all times mentioned herein has maintained, a course of trade in said products in and affecting commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements concerning "Fleischmann's Margarine" products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, by means of advertisements printed in magazines and newspapers distributed by the mail and across state lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said "Fleischmann's Margarine" products.

PAR. 5. Among the advertisements so disseminated or caused to be disseminated by respondent are the advertisements attached as Exhibits A through D hereof.

PAR. 6. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent has represented directly or by implication that:

a) When a doctor chooses margarine, chances are it's Fleischmann's;

b) Twice as many doctors recommend Fleischmann's margarine as any other brand of margarine;

c) Twice as many doctors personally use Fleischmann's margarine as any other brand of margarine;

d) Twice as many doctors recommend and personally use Fleischmann's as any other brand of margarine;

e) Every 15 seconds a doctor recommends Fleischmann's margarine.

PAR. 7. In Exhibits A through D and others substantially similar thereto, respondent has represented directly or by implication that a survey of doctors proves the representations in Paragraph Six above.

PAR. 8. In Exhibits C and D and others substantially similar thereto, disseminated as aforesaid, respondent has represented directly or by implication that:

a) Of those doctors who recommend a polyunsaturated margarine,

twice as many recommend Fleischmann's as any other brand of margarine;

b) Of those doctors who recommend a polyunsaturated margarine, twice as many personally use Fleischmann's as any other brand of margarine;

c) Of those doctors who recommend a polyunsaturated margarine, twice as many recommend and personally use Fleischmann's as any other brand of margarine.

PAR. 9. In Exhibits C and D and others substantially similar thereto, respondent has represented directly or by implication that the aforementioned survey proves the representations in Paragraph Eight above.

PAR. 10. In truth and in fact, the aforementioned survey, conducted for Standard Brands by William Douglas McAdams, Inc. and entitled "Marketing Insights Into Physicians' Attitudes and Opinions Concerning Lipids and Cardiovascular Disease (General Medicine)" (hereinafter referred to as the "McAdams survey"), does not prove the representations in Paragraphs Six and Eight for reasons including but not limited to the following:

a) Of those survey respondents who were asked the question, "Which brand(s) of margarine do you recommend?", most (84.5%) did not state that they recommended Fleischmann's margarine;

b) Of those survey respondents who were asked the question, "Which brand(s) of margarine do you recommend?", most (at least 67.5%) did not recommend a specific name brand of margarine;

c) Of those survey respondents who were asked the question, "Do you use margarine at home? If yes: which brand?", most (82.2%) did not state that they personally used Fleischmann's margarine;

d) Of those survey respondents who were asked the question, "Do you use a margarine at home? If yes: Which brand?", nearly one-half (47.1%) did not state that they used margarine or were unaware of the specific name brand of the margarine they personally used.

e) The survey respondents neither were asked nor stated the frequency of their recommendations of Fleischmann's margarine to their patients or to anyone else.

Therefore, the representations referred to in Paragraphs Seven and Nine were and are unfair and deceptive.

PAR. 11. In Exhibits A through D and others substantially similar thereto disseminated as aforesaid, respondent represented directly or by implication that, in responding to the survey, respondents had

used their medical expertise in recommending, using, or choosing Fleischmann's Margarine.

PAR. 12. In Exhibits A through D and others substantially similar thereto, disseminated as aforesaid, respondent represented directly or by implication that it possessed and relied upon a reasonable basis for the representations in Paragraphs Six, Seven, Eight, Nine and Eleven at the time of their initial and each subsequent dissemination.

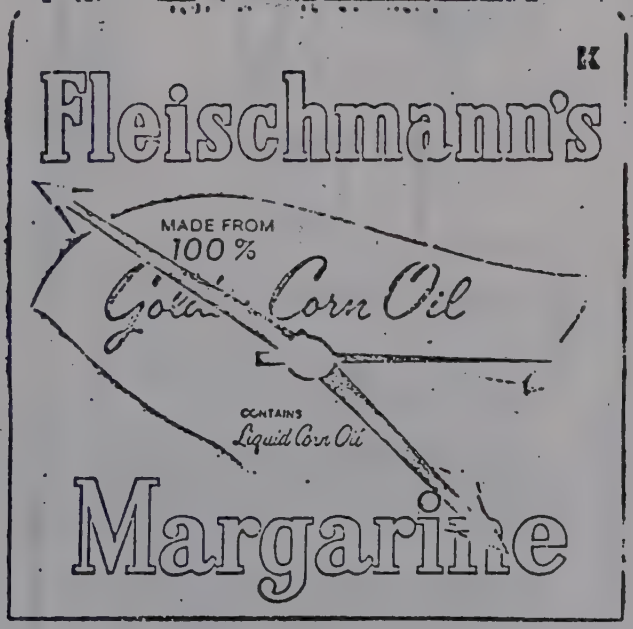
PAR. 13. In truth and in fact, respondent did not possess or rely upon a reasonable basis for the representations in Paragraphs Six, Seven, Eight, Nine and Eleven at the time of their initial and each subsequent dissemination. Therefore, such representations were and are unfair and deceptive.

PAR. 14. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Standard Brands has been, and now is, in substantial competition in or affecting commerce, with corporations, firms and individuals engaged in the sale and distribution of products of the same general kind and nature as those sold by Standard Brands.

PAR. 15. The use by respondents of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of Fleischmann's margarine manufactured by Standard Brands.

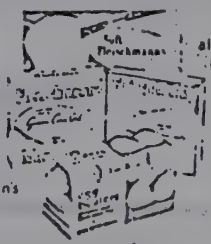
PAR. 16. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Every 15 seconds a doctor recommends Fleischmann's Margarine



Somewhere right about now a doctor is telling a patient to watch his cholesterol and advising him to eat sensibly. And one product he may recommend is Fleischmann's Margarine. A recent survey shows that twice as many doctors recommend Fleischmann's as any other margarine. In fact, based on the frequency with which those doctors made a recommendation, a doctor somewhere is recommending Fleischmann's Margarine every 15 seconds.

Many of those same doctors practice what they preach. The survey also showed twice as many doctors personally use Fleischmann's at home.



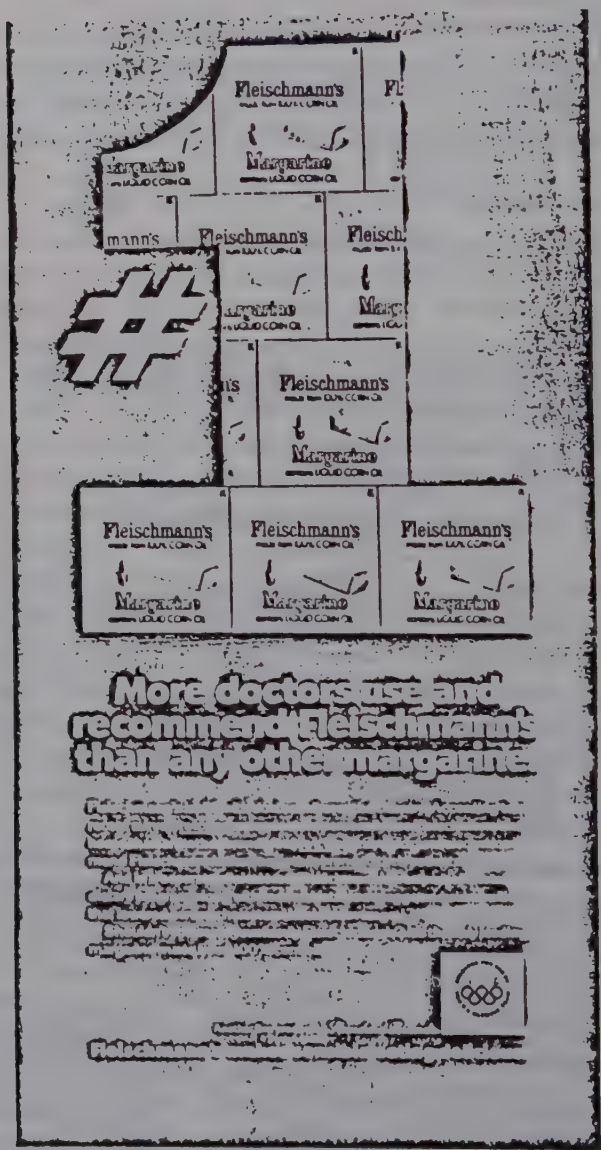
Fleischmann's is the only leading margarine made from 100% corn oil. Fleischmann's was part of a clinical test that lowered serum cholesterol levels an average 17%. In that test Fleischmann's was part of a total dietary program along with reduced fats, fewer eggs and skim milk.

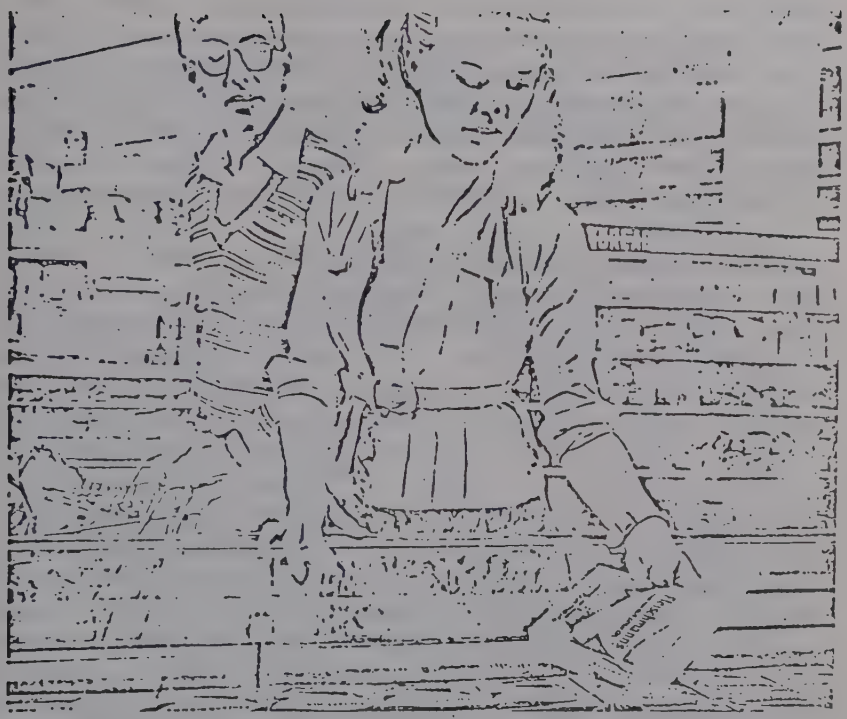
Many doctors also recommend Egg Beaters,* Fleischmann's fresh-frozen, cholesterol-free egg substitute. With Egg Beaters instead of two eggs for breakfast you can save 450 mgs. of cholesterol and still enjoy the good taste of eggs.

Can you afford not to serve your family Fleischmann's?

*Fine products of Standard Brands

Fleischmann's makes sensible eating delicious.


Fleischmann's
Margarine
#1
More doctors use and recommend Fleischmann's than any other margarine.



"When a doctor chooses margarine, chances are it's Fleischmann's."

A recent survey of doctors who believe cholesterol levels can be lowered through a total dietary program proved they practice what they preach! Of those doctors who recommend a polyunsaturated margarine to their patients, twice as many recommend and people buy Fleischmann's as any other brand.

If diet doesn't make you reach for Fleischmann's when you shop, remember it's the only leading margarine made from 100% corn oil. It's high in polyunsaturates and low in saturated fats. Fleischmann's is ideal in a total dietary program designed to lower serum cholesterol. Clinical tests show liquid corn oil's unsurpassed among vegetable oils for lowering serum cholesterol. And 100% corn oil means light, delicious flavor your family will love. Serve your family the margarine more doctors use.

Another fine product of Standard Brands

FLA 1312 EXHIBIT D

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Standard Brands, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 625 Madison Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondent Standard Brands, Inc., a corporation (hereinafter referred to as respondent), and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection

with the advertising, offering for sale, sale or distribution of any product (hereinafter "Product") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making representations, directly or by implication, by reference to a survey or test, or the results thereof, concerning the performance or any characteristic, benefit, recommendation, usage or choice of or other preference for such Product, unless:

(a) such survey or test is designed, executed and analyzed in a competent and reliable scientific manner; and

(b) such survey or test substantiates the claim(s) represented by providing a reasonable basis therefor; and

(c) in regard to any claims of superiority based thereon, such survey or test establishes that such Product is superior to each compared product in respect to which the specific representation is made to a degree that will be discernible to or of benefit to consumers or potential consumers to whom the representation is directed.

2. Representing, directly or by implication, that survey respondents:

(a) recommend such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents do not recommend a specific brand of the product, without disclosing such fact(s); or

(b) use such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents do not use a specific brand of the product, without disclosing such fact(s); or

(c) use such Product more often than any competing product when, in fact, an equal or greater percentage of such respondents are not aware of the specific brand of the product which they do use, without disclosing such fact(s).

3. Representing, directly or by implication, by reference to a survey or test of experts, that experts recommend, use, choose, or otherwise prefer such Product in any respect unless:

(a) such experts in fact possess the expertise to evaluate such Product with respect to such representations; and

(b) such experts actually exercised their expertise by evaluating or

testing such Product, and based their stated preferences, findings, or opinions on such exercise of their expertise; and

(c) such representation, to the extent it expresses or implies a product comparison, is supported by an actual comparative evaluation or test by such experts; and

(d) such representation, to the extent it expresses or implies that such Product is superior to competing products, is supported by an actual comparative evaluation or test by such experts and by a conclusion therefrom that such Product is superior in fact to the competing products with respect to the feature(s) so represented as compared.

4. Representing, directly or by implication, that such product is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products unless and only to the extent that respondent possessed and relied upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination. A reasonable basis shall consist of competent and reliable evidence which substantiates a statement or representation.

5. Failing to maintain records:

(a) which provided the basis upon which respondent relied at the time of the initial and each subsequent dissemination of the claim; and

(b) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

Part II

For purposes of this Order, each of the terms listed below is defined as follows:

1. The term *experts* shall be deemed to be an individual(s), group(s) or institution(s), possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

2. An advertising claim which is a personal endorsement of a product reflecting solely the subjective opinion of the endorser shall not be deemed to be a test.

Part III

It is further ordered, That respondent shall, within 60 days after

service upon it of this Order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, March 27, 1981

Denial of motion for review of ALJ's orders of Jan. 29, 1981 and Feb. 13, 1981.

ORDER

On February 19, 1981, Respondent Standard Oil of California ("SOCAL") sought Commission review of ALJ Timony's January 29, 1981, order denying respondent SOCAL, Standard Oil of Indiana ("SOIND") and Exxon Corporations' ("Exxon") renewed application for discovery on the "reason to believe issue". SOCAL additionally sought "correction" of ALJ Timony's February 13, 1981, order denying interlocutory review of that order. Respondents SOIND and Exxon have joined in SOCAL's request for Commission review of these two ALJ orders.

Under the Commission's Rule of Practice 3.22 all discovery motions are to be addressed to the ALJ, and will be ruled upon by him. Pursuant to his authority, Judge Timony has denied respondents' discovery request. Respondents now request the Commission to exercise its discretion to review the ALJ's orders. While we may exercise such discretion under Rule of Practice 3.23(a) as to certain limited categories of filings, ALJ Timony's orders of January 29, 1981, and February 13, 1981, do not fall within any of these categories.

In addition, pursuant to Rule of Practice 3.23(b), ALJ Timony by his order of February 13, 1981, made the determination that his January 29, 1981, order does not involve a controlling question of law or policy.

Therefore, the respondents' motion is denied.

In the Matter of

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, March 27, 1981

Denial of motion to dismiss complaint.

Order

This matter is before the Commission on the motion of respondent Boise Cascade Corporation to dismiss the complaint. The administrative law judge has issued orders rejecting several of the grounds asserted in the motion and certifying to the Commission, pursuant to Section 3.22(a) of the Rules of Practice, four issues which he believed outside his authority to decide: (1) whether the Commission determined that it had "reason to believe" a violation of the law had occurred and that issuance of the complaint was in the public interest; (2) whether the complaint issued as the result of industry pressure and congressional interference; (3) whether Boise's suppliers who allegedly violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, should have been joined as parties; and (4) whether instead of issuing the complaint the Commission should have instituted a rulemaking proceeding.[1]

I

Respondent contends that the Commission, prior to the issuance of the complaint, failed to make the statutorily required "reason to believe" and "public interest" determinations or that, if a reason to believe determination was made, it was based on insufficient evidence. The complaint makes clear on its face that the Commission did in fact determine it had reason to believe respondent has violated the law and that issuance of a complaint was in the public interest. Respondent's claim that the Commission did not, in fact, make the required reason to believe and public interest determinations is without basis and provides no justification for dismissal. As to the sufficiency of the evidence upon which these determinations were made, the Commission has held that

> the adequacy of the Commission's 'reason to believe' a violation of law has occurred and its belief that a proceeding to stop it would be in the 'public interest' are matters that go to the mental processes of the Commissioners and will not be reviewed by the

[1] Subsequent to the issuance of the ALJ's certification of these issues to the Commission, respondent filed "For Recusal of Commissioner Dixon From This Case And To Dismiss The Complaint." This second motion was denied on March 12, 1981.

courts. Once the Commission has resolved these questions and issued the complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the violation has in fact occurred. *Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974).[2]

See *Boise Cascade Corp.* v. *FTC*, No. 80-305 (D. Del., Sept. 30, 1980) at 7-9, *aff'd*, No. 80-2462 (3d Cir. Feb. 4, 1981).[3]

II

Respondent also contends that "industry and congressional pressure impermissibly influenced the filing of this complaint." Respondent, however, does not allege any facts which would even remotely support this allegation.

Aside from its bald claim of "congressional pressure," respondent neither alleges nor describes any congressional contact or involvement, proper or otherwise, with the Commission's investigation of respondent. The industry "pressure" apparently consists of complaints which were brought to this agency's staff by business rivals of respondent who might benefit if respondent were ordered to alter its practices. That the Commission may have investigated allegations by interested complainants, and ultimately made an independent determination it had "reason to believe" the law was being violated, imparts no impropriety to the Commission. Respondent has failed to allege, let alone establish, facts sufficient to overcome the strong presumption of regularity that attaches to the Commission's law enforcement actions. See, *e.g.*, *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *FTC* v. *Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980); *Willapoint Oysters, Inc.* v. *Ewing*, 174 F.2d 676, 696 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

III

Nor has respondent shown that the Commission improperly failed to name suppliers of respondent as parties. The selection of alleged law violators to be named in a complaint is a matter of prosecutorial discretion. As the Supreme Court stated in *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958), "[T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the

[2] *FTC* v. *Standard Oil Co.*, 101 S.Ct. 488 (1980), decided after respondent filed this motion, held that "the issuance of a complaint" by the Commission is neither "final agency action" nor otherwise "directly reviewable," 5 U.S.C. 704, before the administrative adjudication concludes. It did not reach the question whether the issuance of a complaint is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and hence is excepted from judicial review once the agency issues a final order. 101 S.Ct. at 492-93 n. 7, 496 n.13.

[3] Once a complaint issues, "only in the most extraordinary circumstances" will the Commission review its reason to believe and public interest determinations. *E.g.*, *TRW, Inc.*, 88 F.T.C. 544 (1976). Respondent has made no showing that any such extraordinary circumstances are present here.

ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." See also *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Ger-Ro-Mar, Inc.* v. *FTC*, 518 F.2d 33 (2d Cir. 1975). The Court has specifically recognized the Commission's discretion not to name sellers as respondents in a Section 2(f) case. See *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 79 (1953). In view of the availability of discovery, respondent has not shown that the absence of suppliers as parties will preclude adequate litigation of the Section 2(a) issues in this proceeding.[4]

IV

Finally, respondent argues that the adjudicatory proceeding is in fact a disguised rulemaking because one of the issues, "whether the competing principles of *Doubleday* or of *Mueller*[5] should be applied to dual distributors under the Robinson-Patman Act," is a "legislative" issue which "impacts upon all suppliers to dual distributors ***." However, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); see *Beltone Electronics Corp.* v. *FTC*, 402 F.Supp. 590 (N.D. Ill. 1975). It is well recognized that "adjudicated cases may and do *** serve as vehicles for the formulation of agency policies which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." *NLRB* v. *Bell Aerospace Co.*, 416 U.S.at 294. Respondent has not persuaded us that the legal issues to be addressed in this case are inappropriate for resolution in the course of an adjudicatory proceeding. Accordingly,

It is ordered, That the aforesaid motion, insofar as it was certified to the Commission, be, and it hereby is, denied.

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[4] Complaint counsel have represented that before trial they will furnish respondent a list of between five and ten manufacturers whose sales will provide the basis for the Section 2(a) violations. Respondent therefore will not be "confronted with a universe of conceivable claims that might be advanced concerning any one or more of hundreds of thousands of transactions involving over 24,000 different products, sold by many hundreds of suppliers." (Respondent's Brief at 13.) Moreover, non-party suppliers who believe that their interests may be adversely affected by the proceeding may move to intervene pursuant to Section 3.14 of the Rules of Practice.

[5] *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963); *Doubleday & Co.*, 52 F.T.C. 169 (1955).

In the Matter of

OWENS-CORNING FIBERGLAS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3061. Complaint, March 30, 1981—Decision, March 30, 1981

This consent order requires, among other things, a Toledo manufacturer of glass fiber products, including glass fiber-based asphalt roofing products, to divest to a Commission-approved buyer within 24 months from the effective date of the order, the four specified asphalt roofing plants acquired from the Lloyd A. Fry Roofing Company in 1977. Further, should the company decide to sell the Trumbull asphalt refinery located adjacent to each divested plant, during the ten-year period following the divestiture, it is required, in certain circumstances, to give the owner of the roofing plant the right of first refusal to purchase. Additionally, the firm is barred for ten years, from acquiring without prior Commission approval, any interest in an asphalt roofing plant located in the "Western Market."

Appearances

For the Commission: *David W. Long.*

For the respondent: *James T. Halverson* and *Gregory Bentley, Shearman & Sterling,* New York City.

Complaint

The Federal Trade Commission, having reason to believe that Owens-Corning Fiberglas Corporation ("OCF"), a corporation subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), through the acquisition of certain assets of Lloyd A. Fry Roofing Company ("Fry") and that a proceeding in respect thereof is in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Asphalt roofing products* means saturated felt, roll roofing and

asphalt shingles. *Asphalt roofing products* specifically excludes accessory items such as asphalt cements, adhesives, primers and mineral granules.

(b) *Saturated felt* consists of a dry felt base, made from rags, wood and other cellulose fibers or from glass fiber or asbestos, which is saturated, coated, or impregnated with an oxidized asphalt or tar saturant, but is otherwise untreated.

(c) *Roll roofing* is made from saturated felt by applying an additional coating of more viscous, weather-resistant oxidized asphalt. *Roll roofing* may be either mineral or smooth surfaced. *Roll roofing* includes, *inter alia,* the products known as *cap sheets* and *base sheets.*

(d) *Asphalt shingles* are mineral-surfaced roll roofing which have been machine-cut into rectangular strips or other shapes.

(e) The *Western market* consists of the states of California, Oregon, Washington, Arizona, Nevada, Utah and Idaho.

II. OWENS-CORNING FIBERGLAS CORPORATION

2. Respondent OCF is a corporation organized under the laws of the State of Delaware, with its principal place of business at Fiberglas Tower, Toledo, Ohio.

3. OCF is the nation's largest manufacturer of glass fiber products, including glass fiber insulation and glass fiber-based asphalt roofing products, bathroom fixtures, non-corrosive tanks, and large diameter glass fiber-reinforced tanks. In fiscal year 1979, OCF had consolidated net revenues of approximately $2.26 billion and consolidated net income of approximately $109 million.

4. At all times relevant hereto, OCF sold and shipped asphalt roofing products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

III. LLOYD A. FRY ROOFING COMPANY

5. Fry was a corporation organized under the laws of the State of Delaware, with its principal place of business at 5818 Archer Road, Summit, Illinois. Prior to the acquisition, Fry was the nation's largest privately-held manufacturer of asphalt roofing products.

6. At all times relevant hereto, Fry sold and shipped asphalt roofing products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and

engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

7. On or about April 20, 1977, OCF acquired certain assets, including the asphalt roofing products assets, of Fry and two of its subsidiaries for approximately $101 million. Post-acquisition adjustments raised the final purchase price to approximately $108 million.

V. TRADE AND COMMERCE

8. Asphalt roofing products constitute a competitively significant line of commerce, or market.

9. The Western market is a relevant geographic market for the manufacture and sale of asphalt roofing products.

10. The Western market is substantially concentrated, with the four largest sellers accounting for approximately 57 percent and the eight largest sellers accounting for approximately 87.2 percent of asphalt roofing products sales in 1977.

VI. COMPETITION

11. Prior to the acquisition, OCF and Fry were substantial actual competitors in the manufacture and sale of asphalt roofing products in the Western market.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the acquisition include but may not be limited to the following:

(a) actual competition between OCF and Fry in the sale of asphalt roofing products was eliminated;

(b) actual competition between competitors generally in the sale of asphalt roofing products may be lessened;

(c) Fry was eliminated as an actual substantial independent competitor in the sale of asphalt roofing products; and

(d) concentration in the Western market was increased substantially, diminishing the possibilities for eventual deconcentration of that market.

VIII. VIOLATIONS CHARGED

13. The effect of the acquisition of Fry by OCF may be substan-

tially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

14. The acquisition of Fry by OCF constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Pertschuk did not participate.

Decision and Order

The Federal Trade Commission having initiated an investigation of the acquisition of certain assets of Lloyd A. Fry Roofing Company by Owens-Corning Fiberglas Corporation ("OCF") and OCF having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge OCF with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

OCF, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by OCF of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by OCF that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that OCF has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

Order

For the purpose of this Order the following definitions shall apply:

1. *OCF* means Owens-Corning Fiberglas Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices at Fiberglas Tower, Toledo, Ohio, and its successors and assigns.

2. *Fry* means Lloyd A. Fry Roofing Company, certain assets of

which (as well as certain assets of Trumbull Asphalt Company of Delaware and Summit Wholesale Supply Company) were acquired by OCF pursuant to an agreement dated April 20, 1977.

3. *Plant* means all properties and assets acquired and received from Fry, consisting of all real and personal property described in Paragraphs 4.8 and 4.9 of the Sale of Assets Agreement dated April 20, 1977, among OCF, Fry, Trumbull Asphalt Company of Delaware and Summit Wholesale Supply Company and in Exhibits F-H to such agreement, together with all additions and improvements thereto, that are located at:

(a) Compton, California;
(b) Portland, Oregon;
(c) San Leandro, California; and
(d) Woods Cross, Utah;

provided, however, that the term *Plant* does not include those assets or properties disposed of by OCF in the ordinary course of the business of operating or renovating such facilities for the manufacture of asphalt roofing products; and *provided further* that the term *Plant* does not include such properties or assets as would otherwise be deemed part of the Plant where the Eligible Person acquiring the Plant elects, in its sole discretion, but subject to the approval of the Commission, not to acquire those properties or assets; and *provided further* that the term *Plant* shall include only the land, properties and assets so acquired and received from Fry as are approximately indicated as within the areas bounded by solid red lines on the attached maps.

4. *Person* means any individual, corporation, partnership, joint venture, trust, unincorporated association, or other business or legal entity.

5. *Asphalt Facility* means a plant operated by OCF's Trumbull Asphalt Division, which produces *inter alia* oxidized roofing asphalt.

6. *Asphalt Roofing Plant* means a plant primarily engaged in the manufacture of *asphalt roofing products* as such products are defined in Paragraphs I(1)(a)-(d) of the Complaint.

7. *Eligible Person* means any Person approved by the Commission. No Person shall be considered for status as an Eligible Person unless the Commission is satisfied that the Person has the capacity and intention to operate the Plant(s) to be acquired as a facility or facilities for the manufacture of asphalt roofing products.

8. *Divest* means any act by which OCF sells, transfers, conveys or relinquishes ownership, possessory interest and control of the Plants.

I.

It is ordered, That within twenty-four (24) months of the effective date of this Order OCF shall Divest the Plants subject to the terms of this Order. The Plants may be Divested either separately or in any combination.

II.

It is further ordered, That the divestitures of the Plants shall be made only to one or more Eligible Persons and that OCF shall submit the proposed divestitures to the Commission for its prior approval.

III.

It is further ordered, That pending the divestitures required by this Order, OCF shall not cause, and shall use its best efforts to prevent, the deterioration of the Plants in a manner that impairs the marketability of any such Plants, normal wear and tear excluded. OCF may, but shall not be required to, make capital expenditures for the improvement of the Plants. Nothing in this Order shall prevent OCF from operating or furloughing employees at the Plants in a manner consistent with normal business practice, comparable to the manner in which it operates or furloughs at its other Asphalt Roofing Plants, pending the divestitures required by this Order.

IV.

It is further ordered, That if, at any time during the ten (10) years following the divestiture of each Plant, OCF desires to sell the Asphalt Facility located adjacent to such Plant to a third-party not owned directly or indirectly more than 5% by OCF, then OCF shall, after reaching agreement with such third-party as to the price, terms and conditions to be included in the contract of sale between such third-party and OCF but prior to executing such contract of sale, first offer to sell such Asphalt Facility to whichever Person then owns such Plant for the same price, and upon the same terms and conditions, as are shown in such proposed contract of sale with such third-party; *provided further,* that for the purposes of this Paragraph "OCF" shall include any subsidiary in which the voting stock is more than 50 percent owned directly or indirectly by OCF.

V.

It is further ordered, That for a period of ten (10) years from the date of this Order, OCF shall not directly or indirectly acquire, through purchase, lease or such other transaction as would confer ownership, possessory interest or control of, any Asphalt Roofing Plant located in the states of California, Oregon, Washington, Arizona, Nevada, Utah or Idaho, without the prior approval of the Commission.

VI.

It is further ordered, That OCF shall within ninety (90) days from the effective date of this Order and every ninety (90) days thereafter until the divestitures required by this Order are completed submit in writing to the Commission a verified report setting forth in detail the manner and form in which OCF intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as the Commission may from time to time reasonably require.

VII.

It is further ordered, That OCF notify the Commission at least thirty (30) days prior to effecting any proposed change in corporate respondent which may affect compliance with the obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation.

VIII.

It is further ordered, That OCF shall, upon written request of the Secretary of the Commission or the Director of the Bureau of Competition of the Commission made to OCF at its principal office for the purpose of securing compliance with this Order, and for no other purpose, permit duly authorized representatives of the Commission or the Director of the Bureau of Competition, subject to any legally recognized privilege:

(1) reasonable access during the office hours of OCF, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in OCF's possession or control which relate materially and substantially to any matter contained in this Order; and

(2) an opportunity, subject to the reasonable convenience of OCF, to interview officers or employees of OCF, who may have counsel present, regarding such matters.

The foregoing provision shall not be interpreted to provide any access for the Commission to records relating to any of the business activities of OCF other than the Plants and Asphalt Facilities subject to this Order. Access hereunder to Asphalt Facilities records shall be limited to records relating solely to compliance with the requirements of Paragraph IV of this Order.

IX.

Nothing in this Order shall be deemed or construed to affect any statutory rights to confidential treatment of documents or information provided to the Commission by OCF, as such rights are accorded by the Federal Trade Commission Improvements Act of 1980 or other statute.

Commissioner Pertschuk did not participate.

IN THE MATTER OF

THE COCA-COLA COMPANY, ET AL.

Docket 8855. Interlocutory Order, April 1, 1981

Dismissing proceeding without prejudice to reopen under the standards of the Soft Drink Interbrand Competition Act.

ORDER

Respondents filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's cease and desist order issued herein on April 7, 1978. Subsequently, Congress enacted the Soft Drink Interbrand Competition Act, Pub. Law No. 96-308, 94 Stat. 939 (1980), which established standards for judging the challenged restraints which differ from those under which the Commission tried and decided these proceedings. Therefore, in September 1980, the Commission requested the Court of Appeals to set aside the Commission's order and remand these proceedings to the Commission for dismissal, without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act. By an opinion and judgment dated February 5, 1981, the Court of Appeals granted the Commission's request.

Now, therefore, *it is hereby ordered,* in accordance with the opinion and judgment of the Court of Appeals, that this proceeding be, and hereby is, dismissed, without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act.

Commissioner Pertschuk did not participate.

IN THE MATTER OF

PEPSICO, INC.

Docket 8856. Interlocutory Order, April 1, 1981

Dismissing proceeding without prejudice to reopen under the standards of the Soft Drink Interbrand Competition Act.

ORDER

Respondents filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's cease and desist order issued herein on April 7, 1978. Subsequently, Congress enacted the Soft Drink Interbrand Competition Act, Pub. Law No. 96–308, 94 Stat. 939 (1980), which established standards for judging the challenged restraints which differ from those under which the Commission tried and decided these proceedings. Therefore, in September 1980, the Commission requested the Court of Appeals to set aside the Commission's order and remand these proceedings to the Commission for dismissal, without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act. By an opinion and judgment dated February 5, 1981, the Court of Appeals granted the Commission's request.

Now, Therefore, *it is hereby ordered,* in accordance with the opinion and judgment of the Court of Appeals, that this proceeding be, and hereby is, dismissed, without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act.

Commissioner Pertschuk did not participate.

IN THE MATTER OF

GOULD INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 8 OF THE CLAYTON ACT

Docket 9136. Complaint, May 9, 1980—Decision, April 1, 1981

This consent order requires, among other things, a Rolling Meadow, Ill. manufacturer and seller of various electrical products to cease having on its board any director who simultaneously serves as a director of a competing company, if the revenues of either corporation derived from the competing "product or service market" exceed the lesser of ten million dollars or one percent of the corporation's total sales; or any individual who fails to provide the statement required under the terms of the order. The order further requires that the company institute an annual monitoring program for the next five years, designed to detect unlawful interlocks.

Appearances

For the Commission: *Dennis F. Johnson* and *David M. Malone.*

For the respondent: *John Reilly, John Milliken* and *David Ford, Winston & Strawn,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45, and that a proceeding by it in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent Gould Inc. ("Gould") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 10 Gould Center, Rolling Meadows, Illinois. Gould has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 2. Midland-Ross Corporation ("Midland-Ross") is a corporation organized under the laws of the State of Ohio, with its principal place of business located at 20600 Chagrin Boulevard, Cleveland,

Ohio. Midland-Ross has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 3. Claude M. Blair is an individual, with his principal place of business located at National City Corporation, Post Office Box 5756, Cleveland, Ohio.

PAR. 4. Gould conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 5. Midland-Ross conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 6. Claude M. Blair was, until his resignation from Gould's board of directors on or about July 24, 1979, a member of the boards of directors of both Gould and Midland-Ross. He has been a director of Midland-Ross since 1974, and was a director of Gould from 1969 until his resignation.

PAR. 7. During all or part of the period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, the business of Gould and Midland-Ross included the manufacture and sale of various electrical products, including electrical busways and electrical conduit fittings.

PAR. 8. By the nature of their business as hereinabove described and the locations of their operations, Gould and Midland-Ross have been competitors, during all or part of the time period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 9. The simultaneous membership of Claude M. Blair on the boards of directors of Gould and Midland-Ross constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

PAR. 10. Paragraphs One and Four are incorporated herein.

PAR. 11. Narco Scientific, Inc. ("Narco") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at Fort Washington Industrial Park, Fort Washing-

ton, Pennsylvania. Narco has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 12. William C. Musham is an individual, with his principal place of business located at Gould Inc., 10 Gould Center, Rolling Meadows, Illinois.

PAR. 13. Narco conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 14. William C. Musham was, until his resignation from Narco's board of directors during January 1980, a member of the boards of directors of both Gould and Narco. He has been a director of Gould since 1976, and was a director of Narco from 1977 until his resignation.

PAR. 15. During all or part of the period that William C. Musham concurrently served as a director of Gould and Narco, the business of Gould and Narco included the manufacture and sale of electronic medical devices.

PAR. 16. By the nature of their business as hereinabove described and the locations of their operations, Gould and Narco have been competitors, during all or part of the time period that William C. Musham concurrently served as a director of Gould and Narco, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 17. The simultaneous membership of William C. Musham on the boards of directors of Gould and Narco constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging Gould Inc. ("Gould") with violation of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Gould having been served with a copy of that complaint, together with a notice of contemplated relief; and

Gould and its attorney having thereafter executed an agreement containing a consent order, an admission by Gould of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Gould that the law has been violated

as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Gould Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 10 Gould Center, Rolling Meadows, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Gould, and the proceeding is in the public interest.

Order

I

The following definitions shall apply in this order:

Subsidiary of a corporation means any company of which 50 percent or more of the issued and outstanding voting stock is owned or controlled, directly or indirectly, by such corporation.

Parent of a corporation means any company which owns or controls, directly or indirectly, 50 percent or more of the issued and outstanding voting stock of such corporation.

Sister of a corporation means any subsidiary of a parent of that corporation.

Product or service market means any line of commerce in which Gould's (including its subsidiaries and divisions) annual revenues exceed the lesser of:

(1) Five million dollars; or
(2) One-half of one percent of Gould's total annual revenues.

II

It is ordered, That respondent Gould Inc. ("Gould"), its successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, on its board of directors any person who either:

(a) Serves at the same time as a director of any other corporation if Gould and such other corporation are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws, providing that the revenues of either corporation derived from the product or service market(s) in which they are competitors exceed the lesser of:

(1) Ten million dollars; or
(2) One percent of the total sales of that corporation; or

(b) Fails to submit to Gould any statement required to be obtained by Gould under Paragraph III of this order.

III

It is further ordered, That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, Gould shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of such director or nominee; and
(b) the name and principal office mailing address of, and a listing of each product or service produced, offered or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement.

The requirements of this Paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of Gould.

Nothing in this Paragraph shall be construed to relieve Gould of its obligation under Paragraph II(a) of this order due to any error or omission contained in any written statement received pursuant to this Paragraph.

If competition arises in any product or service market between Gould and any other corporation with which Gould shares a common director, by virtue of action taken by such other corporation subsequent to a submission of information by such director pursuant

to this paragraph, then Gould shall not be liable under Paragraph II until the date for the next submission of information.

IV

It is further ordered, That within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, Gould shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph III of this order shall be submitted to the Commission as part of the reports of compliance required by this Paragraph during the first five (5) years. Nothing in this Paragraph shall relieve Gould of its obligation to comply with Paragraphs II and V or this order once it is no longer required to submit reports of compliance to the Commission.

V

It is further ordered, That Gould shall notify the Commission not more than thirty (30) days after any change in the corporation, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

In the Matter of

ENERGY EFFICIENT SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3062. Complaint, April 9, 1981—Decision, April 9, 1981

This consent order requires, among other things, a Middletown, Conn. corporation and two corporate officers engaged in the advertising, sale and distribution of an electric space heater known as the "Boekamp Quartz Heater" to cease misrepresenting the efficiency, energy savings, performance characteristics and durability of the product. The order further prohibits respondents from making any energy-related advertising claim without reliable substantiation, and bars them from using the term "energy saver," or similar terms in product names. Additionally, respondents are required to send a copy of a prescribed letter to all individuals or business entities engaged in the sale of the Boekamp Quartz Heater advising them of the terms of the order and requesting the return of all advertisements and promotional materials which contain prohibited claims or which fail to include required disclosures.

Appearances

For the Commission: *Joan Gerrity, John B. Gatlin* and *Douglas M. Husid.*

For the respondent: *Michael Steres, Feldman & Steres,* San Diego, Calif., and *John T. Coyne* and *William Barton, Carr, Jordan, Coyne & Savits,* Washington, D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and of the Energy Policy and Conservation Act, as amended, and by virtue of the authority vested in it by those Acts, the Federal Trade Commission, having reason to believe that Energy Efficient Systems, Inc., a corporation, and John P. White and Elaine B. Owen, individually and as officers of the corporation, hereinafter sometimes referred to collectively as respondents, have violated the provisions of the Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Energy Efficient Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its principal office

and place of business located at 330 Middle St., Middletown, Connecticut.

Respondents John P. White and Elaine B. Owen are officers of the corporate respondent named herein. Together they formulate, direct and control the policies, acts and practices of the corporate respondent hereinafter set forth. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the purchasing, advertising, promotion, offering for sale, sale and distribution of a product known as the Boekamp Quartz Energy Saver Heater ("Boekamp Heater") and other products for which energy related claims are made.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the Boekamp Heaters to be shipped from their place of business in the State of Connecticut to purchasers throughout the United States. Respondents now disseminate or cause the dissemination of, and for some time last past have disseminated or caused the dissemination of, certain advertisements and promotional materials concerning the Boekamp Heater by use of the United States mail and have advertised the Boekamp Heater in newspapers of interstate circulation. Accordingly, respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The advertisements and promotional materials referred to in Paragraph Three include, but are not limited to, the materials marked as Appendix A and attached hereto.

I

PAR. 5. By and through the use of the aforementioned advertisements and promotional materials, respondents have represented and are now representing, directly or by implication, that:

a. the Boekamp Heater is twice as efficient as conventional electric resistance heaters;

b. the Boekamp Heater will provide two to three times as much heat as conventional electric resistance heaters of similar wattage;

c. the Boekamp Heater provides "free" heat because its quartz tubes do not cool down during the Boekamp Heater's off cycle;

d. the Boekamp Heater is capable of heating objects which are far away from it in a short period of time;

e. the Boekamp Heater evenly distributes heat throughout a typical room;

f. the quartz tubes contained in the Boekamp Heater intensify and magnify the heat generated by the electricity sent through the resistance coils enclosed in the tubes;

g. the quartz tubes contained in the Boekamp Heater are durable components.

PAR. 6. In truth and in fact, contrary to respondents' representations set forth in Paragraph Five:

a. the Boekamp Heater is not twice as efficient as conventional electric resistance heaters. All electric resistance heaters produce the same number of British Thermal Units ("BTUs") of heat per watt;

b. the Boekamp Heater will not provide two to three times as much heat as conventional electric resistance heaters of similar wattage;

c. the quartz tubes contained in the Boekamp Heater do cool down during the Boekamp Heater's off cycle and the Boekamp Heater does not provide "free" heat for the foregoing reason or for any other reason;

d. the Boekamp Heater is not capable of heating objects which are far away from it in a short period of time. The Boekamp Heater will only be able to heat objects far away from it if the Boekamp Heater has been operated for a lengthy period of time so that the air space between the Boekamp Heater and the object has itself been heated;

e. the Boekamp Heater does not evenly distribute heat throughout a typical room;

f. the quartz tubes contained in the Boekamp Heater do not intensify or magnify the heat generated by the electricity sent through the resistance coils enclosed in the tubes. The quartz tubes only transfer the heat generated by the resistance coils;

g. the quartz tubes contained in the Boekamp Heater are not durable components. The quartz tubes are fragile elements which shatter easily on impact when the tubes are hot.

Therefore, said advertisements and promotional materials were, and are, false, deceptive, misleading or unfair.

II

PAR. 7. By and through the use of the aforementioned advertise-

ments and promotional materials, respondents have represented and are now representing, directly or by implication, in addition to those representations set forth in Paragraph Five, that:

(a) a typical user of a Boekamp Heater will save 50% over his/her prior home heating costs;

(b) a typical user of a Boekamp Heater will drastically reduce his/her fuel bills while maintaining personal comfort;

(c) users of the Boekamp Heater report dramatic utility bill savings;

(d) a single Boekamp Heater will raise the temperature in an unheated room of typical size to a comfortable temperature in twenty minutes;

(e) when the outside temperature is 5 degrees Fahrenheit, one 1500 watt Boekamp Heater will maintain a room temperature of 72 degrees Fahrenheit under certain stated conditions;

(f) the Boekamp Heater will heat a typical room more quickly than conventional electric resistance heaters;

(g) the Boekamp Heater provides special comfort to arthritics and others suffering from similar ailments.

PAR. 8. At the time respondents made the representations alleged in Paragraphs Five and Seven they did not possess and rely upon a reasonable basis for such representations. Therefore, the aforementioned advertisements and promotional materials were, and are, unfair, deceptive or misleading.

PAR. 9. By and through the use of the aforementioned advertisements and promotional materials, respondents have represented and are now representing, directly or by implication, that they had a reasonable basis for the representations alleged in Paragraphs Five and Seven at the time they were made. In truth and in fact, respondents had no reasonable basis for the representations alleged in Paragraphs Five and Seven. Therefore, said advertisements and promotional materials were, and are, deceptive, misleading or unfair.

III

PAR. 10. In the course and conduct of their business, respondents have used the term "Quartz Energy Saver" to refer to the Boekamp Heater in the aforementioned advertisements and promotional materials. By and through the use of that term, respondents have represented and are now representing, directly or by implication,

that the Boekamp Heater consumes less electricity than other electric resistance heaters in providing the same amount of heat.

PAR. 11. In truth and in fact, contrary to respondents' representation set forth in Paragraph Ten, the Boekamp Heater provides the same number of BTUs per watt as any other electric resistance heater. Therefore, the use of the term "energy saver" to refer to the Boekamp Heater was, and is, deceptive, misleading or unfair.

IV

PAR. 12. By and through the use of the aforementioned advertisements and promotional materials, respondents have represented and are now representing, directly or by implication, that the Boekamp Heater will quickly and efficiently heat a whole room. In contrast, the operating instructions for the Boekamp Heater, which are provided to consumers after they purchase a Boekamp Heater, caution users to avoid trying to heat a whole room with the Boekamp Heater.

PAR. 13.

(a) The operating instruction referred to in Paragraph Twelve is a material fact in light of the representation made in advertisements and promotional materials as set forth in Paragraph Twelve. The aforementioned advertisements and promotional materials fail to disclose this material fact. Therefore, said advertisements and promotional materials were, and are, deceptive, misleading or unfair.

(b) The operating instruction referred to in Paragraph Twelve is materially inconsistent with the representation made in advertisements and promotional materials as set forth in Paragraph Twelve. Therefore, said advertisements and promotional materials were, and are, deceptive, misleading or unfair.

V

PAR. 14. The Boekamp Heater is an unvented electric resistance heater which falls within the category of products defined as "unvented home heating equipment" in 10 C.F.R. 430.2 and as such is a "covered product" as that term is defined in Sections 321(a)(2) and 322 of the Energy Policy and Conservation Act, 42 U.S.C. 6291(a)(2) and 6292.

PAR. 15. In the course and conduct of their business, on and after November 10, 1978, respondents have made, and continue to make, representations, directly or by implication, respecting the energy

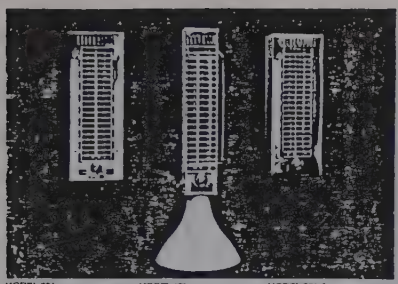
consumption of the Boekamp Heater or the cost of energy consumed by the Boekamp Heater, including the representations set forth at subparagraphs (a), (b) and (c) of Paragraph Five.

The aforementioned representations do not fairly disclose the results of tests conducted on the Boekamp Heater in accordance with the test procedures applicable to "unvented home heating equipment" as prescribed by the Secretary of the Department of Energy at 10 C.F.R. 430.22(g) and 10 C.F.R. Subpart B, Part 430, Appendix G. Therefore, and pursuant to 42 U.S.C. 6293(c) and 6303(c), said representations were, and are, deceptive, misleading or unfair.

PAR. 16. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with individuals, firms, and corporations engaged in the distribution and sale of space heaters and other products for which energy related claims are made.

PAR. 17. The use by respondents of the aforementioned false, deceptive, misleading or unfair representations has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that the representations were and are true and complete, and into the purchase of substantial quantities of the Boekamp Heater by reason of this erroneous and mistaken belief.

PAR. 18. The acts and practices of respondents, as herein alleged, were and are to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.



MODEL 201
RECESSED WALL MODEL
with built-in Energy Controller

MODEL 202
PORTABLE MODEL
with built-in Energy Controller

MODEL 201-S
SURFACE MOUNT MODEL
with built-in Energy Controller

SPECIFICATIONS

Model	Watts	Amps	Volts	BTU
201-1000	1000	10	240/120	4000
201-1500	1500	12.5	240/120	5000
201-2000	2000	8	240	6800

Weight 7 pounds

SPECIFICATIONS

Model	Watts	Amps	Volts	BTU
202-1000	1000	10	240/120	4000
202-1500	1500	12.5	240/120	5000
202-2000	2000	8	240	6800

Weight 9.25 Pounds

SPECIFICATIONS

Model	Watts	Amps	Volts	BTU
201S-1000	1000	10	240/120	4000
201S-1500	1500	12.5	240/120	5000
201S-2000	2000	8	240	6800

Weight 9.25 Pounds

The Energy Controller on the front of all models is a special feature found only on the Quartz Energy Saver Heater, offering the user a personal choice of heat output and energy consumption. This heater completes an ON-OFF cycle every 20 seconds, and the Energy Controller allows the user to select the ON part of the cycle to be anywhere from 2% to 100% of the time, be the OFF part of the cycle the heater draws no current.

All Quartz Energy Saver Heaters are UL Listed, and have a limited warranty for domestic use for one year from date of purchase.

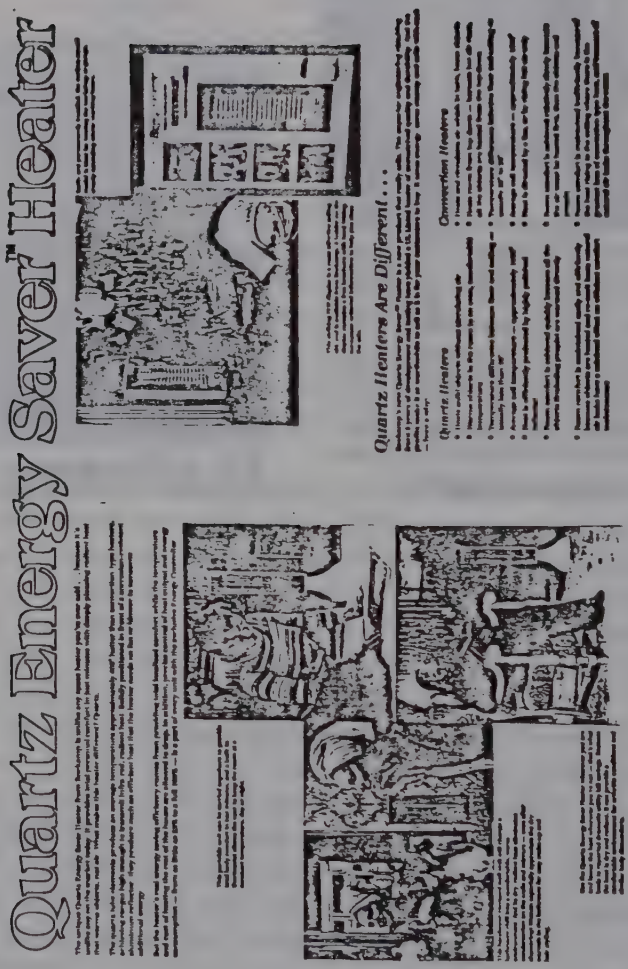
S.T.R. — This standard unit of heat S.T.R. is used for comparing all types of heating and cooling units. It does not take into consideration the cost of fuel being transmitted. The Stationary Quartz Energy Saver Heater is not a convection heater — it provides a source of radiant heat that is transmitted through the air to all of the solid objects, including people, in the room. For this reason, S.T.R.s may not be the most accurate method of space heater comparison. F.T. Quartz Section on Convection Optimization for further information.

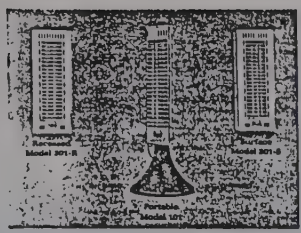
Heat Center: The large piece of quartz crystal happened on our heater into orbital when it was asked to an expensive that springs, Arkansas, has of the finest minerals in the world, its unique properties of transmitting heat and light make it used as a key part of the Exclusive Quartz Energy Saver Heater.

Boekamp, Inc. 21400 Crenshaw Street
La Mesa, CA 92041
714/466-2168

Introducing a Space Heater
Like You've Never Sold Before

Boekamp, Inc.


Quartz Energy Saver Heater
Quartz Heaters Are Different . . .
Quartz Heaters
Convection Heaters



	Model	Volts	Amps	Watts	BTU
PORTABLE MODEL	301-1212	120	12.5	1500	5120
RECESSED WALL MODEL	3012-1212	120	10	1200	4094
	3012-1224	240	5	1200	4094
SURFACE MOUNT MODEL	3012-1212	120	10	1200	4094
	3012-1224	240	5	1200	4094

All models feature the exclusive Energy Controller and are fully UL Listed. Portable model features 3 prong grounded plug.

Designed to help you combat the high cost of energy while providing comfort and style in localized heating . . . get your Boekamp Quartz Energy Saver® Heater today!

USES:

Living Rooms
Bathrooms
Workshops

Stables/Barns
RVs/Motorhomes
Family Rooms
Offices

Patios
Boats
Mobile Homes

Quartz Energy Saver® Heater
Boekamp® Inc.
San Diego, California

Available from:

© 1990 BOEKAMP INC. Printed in U.S.A. Form No. 1007B

Introducing a Space Heater Like You've Never Used Before

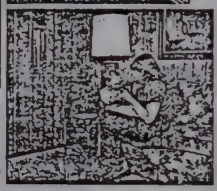
Boekamp®

Boekamp®...The ORIGINAL Quartz Energy Saver® Heater

Designed and developed to combat the high costs of energy, the U.S. made Boekamp Heater is the sensible solution to effective, efficient heating. Features:

- Total personal comfort in just minutes
- Deeply pleasing, infrared radiant heat
- Heat projected by polished reflector — no fan or blower necessary
- Localized warmth allows temperature and cost of heating rest of house to drop
- Exclusive Energy Controller offers precise control of heat output and energy consumption

Easily and permanently installed, the surface mount model is ideal for keeping you warm in the garage or workshop.



This portable unit can be carried anywhere to provide body comfort in just minutes, and features a Tip-Over Safety Switch that shuts the heater off if it is knocked over.

The attractive recessed wall model adds warmth and heating efficiency to a living room, family room, bathroom or wherever you wish to travel with.

Quartz Heaters are Different . . .

BOEKAMP QUARTZ ENERGY SAVER®

- Room is quickly warmed to an even, comfortable temperature
- Heat is efficiently projected through the air to solid objects by highly polished reflector; there's no need for circulating air
- Temperature difference between floor and ceiling — usually less than 10°.
- Average coil temperature — approximately 1200°
- Room comfort is achieved quickly because people and objects are warmed directly
- Room comfort is maintained easily because objects are heated and re-emit heat; natural air leaks have a minimal effect on comfort maintenance

OLD-FASHIONED CONVECTION HEATERS

- Room is slowly heated from top down because hot air rises
- Heat is directed into the room by fan, or rising hot air only; the air must then heat the objects in the room
- Temperature difference between floor and ceiling — usually 30° to 50°
- Average coil temperature — approximately 1500°
- Room comfort is achieved slowly because air must first be heated, then objects and people are heated
- Room comfort is maintained inefficiently because of heat loss through the ceiling and natural air leaks throughout the room

EEP III "B" 05/01/79 to Present

APPENDIX A-3

COMPARATIVE ANALYSIS

QUARTZ HEATERS vs. CONVENTIONAL-TYPE HEATERS

Prepared by:

Malcolm D. Campbell
Senior Staff Scientist
Materials Research

Conducting tests to quantitatively compare the performances of quartz heaters versus convection-type heating is difficult because of the infinite manner of possible combinations of variables. This is further complicated by the difficulty of assessing human responses. However, any heater serves only one purpose — to provide comfort to people and heats like the basic differences between the Boehamp Quartz Energy Saver Heater and the typical convection-type electric heater.

Most electric heaters circulate a small portion of the room air over the heating elements. This is accomplished with either natural convection or a fan which pulls cold air into the heater and pushes warmed air out. Convection is the vertical movement of warm air as it heats and becomes lighter and is then replaced by in-flowing cold air. It requires large heater areas to move sufficient air to produce reasonable temperature elevation. Fan-driven designs are noisy, but can be more compact in size.

Both types produce a comfortable living environment by raising the temperature of the entire volume of air in the room. In the process, however, they must also heat the contents of the room over which the air flows. Once the room is warmed, the heater continues to consume power to make up for inherent heat losses from the room.

A convection-type heater relies on the air being heated as it passes through the heater. The hot air, being lighter in density, rises to the ceiling. Although objects are warmed by the circulating air, the room, in general, heats from the top down. When the air temperature just a few feet off the floor is comfortable for people, the air temperature near the ceiling (where it is not needed) may be as much as 30 degrees higher. This results in a high percentage of the energy consumed being lost through ceilings and upper walls.

The quartz infra-red heater consists of a coil of special resistance wire encased in a quartz tube. The coil is heated to a temperature range between 1800 and 2000 degrees Farenheit — a temperature that exceeds the coil temperature of a convection-type heater by as much as 500 degrees. At these temperatures, most of the electrical energy supplied is converted into electromagnetic radiation, which is emitted from the coil. The "glow" of any hot wire is the radiation which is in the visible range, i.e., detectable by the human eye. However, this is less than one percent of the total radiation emitted. Most of the remainder is in the "infra-red" region.

Quartz is used for several specific reasons: 1) it supports and protects the hot coil and will survive the excessive operating temperatures; 2) it is totally heat efficient, virtually eliminating any heat loss from the coil and 3) is relatively transparent to the infra-red radiation.

The quartz elements are mounted in front of a high-efficiency reflector so that nearly all of the radiant heat generated is beamed in the desired direction. Contrary to the mode of operation of the typical convection-type heaters, very little of the room air is heated directly. However, the radiation emitted from the quartz heater passes through the air with only minimal energy (heat) loss and strikes any solid object in its path. When this happens, the radiation is "absorbed" and objects are heated. Those objects, in turn, emit heat.

The basic difference in mode of operation: Quartz versus Convection: accounts in several ways for the reduced cost of operating a quartz heater. First, with quartz heat, the objects in the room (including people) are heated to comfortable levels long before the room temperature would provide a comfortable environment. Thus, the quartz heater uses less energy to provide body comfort. There is a tremendous advantage in the energy savings since the instant response of the quartz heater eliminates the costly efforts of pre-heating an area to be comfortable.

Only a small amount of the energy consumed by a well-designed quartz heater is expended in excessive heating of the air in the vicinity of the heater. Therefore, there is much less of a temperature difference from floor to ceiling and the ceiling temperature and heat losses are considerably less. With the people being heated directly by radiant heat, the overall air temperature can be very low, which minimizes heat losses through the walls and ceilings, as well as floors. These facts are primarily responsible for the lower power consumption required to maintain the comfort level once it has been reached.

As with any heating system, quartz heaters must be properly installed and used to the full advantage of their inherent features. Since radiant heat is directional heat, use of two small quartz heaters with energy saving features, to heat a large room from both directions is more efficient than one large heater. They should also be directed away from windows and all other sources of great heat loss. These practices will further enhance the efficiency of the unit.

In conclusion, in a typical residential situation, advanced design quartz infra-red heaters, such as those manufactured by Boehamp, Inc., can provide satisfactory comfort levels at half or less the normal operating costs of other types of electric heating. The unparalleled performance of the quartz heater enables the user to achieve immediate local comfort levels without the antiquated and costly luxury of having to heat the whole house to be comfortable in just one room or area.

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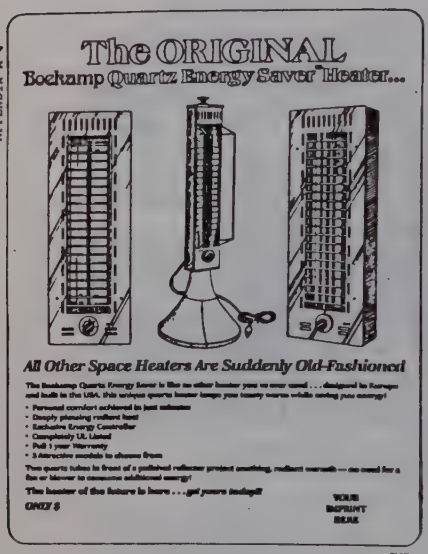
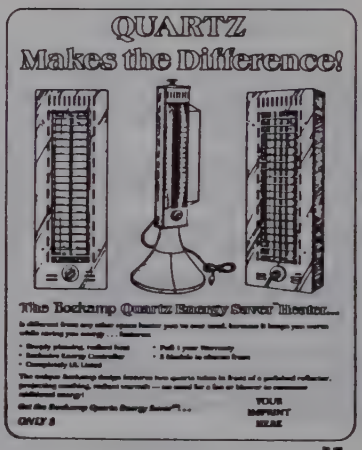
APPENDIX A-4


The ORIGINAL
Bockamp Quartz Energy Saver Heater...
All Other Space Heaters Are Suddenly Old-Fashioned
The Bockamp Quartz Energy Saver is like no other heater you ever used . . . designed in Europe and built in the USA, this unique quartz heater keeps your toasty warm while saving you energy!
• Personal comfort achieved in just minutes
• Deeply pleasing radiant heat
• Exclusive Energy Controller
• Completely UL Listed
• Full 1 year Warranty
• 3 Attractive models to choose from
Two quartz tubes in front of a polished reflector protect soothing, radiant warmth — no need for a fan or blower to consume additional energy!
The heater of the future is here . . . get yours today!
ONLY $
YOUR IMPRINT HERE


QUARTZ
Makes the Difference!
The Bockamp Quartz Energy Saver Heater...
• Deeply pleasing, radiant heat
• Exclusive Energy Controller
• Completely UL Listed
• Full 1 year Warranty
• 3 Models to choose from
ONLY $
YOUR IMPRINT HERE

"QUARTZ HEATING," the modern solution to efficient, effective heating

BASIC FACTS ON THE HOLKAMP "QUARTZ ENERGY SAVER"

DIRECT EFFICIENCY:

The Quartz Energy Saver heats objects instead of air. Every object (people) absorbs and puts off heat. This unique concept in heating is commonplace in Europe, but relatively new in the United States.

PROVIDES INSTANT HEAT:

The Quartz Energy Saver achieves maximum heating capacity in less than one minute. This eliminates the necessity to pre-heat areas to comfort levels prior to use, thereby reducing your cost of energy.

OPERATING EFFICIENCY:

Test reports indicate the Quartz Energy Saver produces twice as much heat as conventional convection electric heating systems of similar voltage. No energy is wasted in the Quartz Energy Saver, and no fan (which cools oven heaters) is required to move heat to far away objects. The combination of Quartz and radiant heat has produced a Quartz Energy Saver capable of providing up to three times as much heat over conventional fan driven electric heaters.

HEATING CAPACITY:

The Quartz Energy Saver operates on the highest level of the infra-red spectrum, producing temperatures up to 2,000 degrees Fahrenheit within the quartz elements. The heat is radiated from the elements and the reflection screen at an angle of 170 degrees off the face of the heater. Radiant heat will not bend around corners and objects in direct line of sight will absorb greater amounts of heat. The Quartz Energy Saver is capable of radiating heat to objects 30' away.

ENERGY SAVING CONTROLLER:

The Quartz Energy Saver is equipped with a controller which time system power to the quartz elements. The electrical input can be controlled in 13 positions from the low to high setting, permitting the flow of electrical current from 13 to 100% of the time. This permits the user to set there desired comfort level. Quartz elements do not cool down during the off (no energy) cycle, thereby "first" heat is provided during this time period. The Quartz Energy Saver does not surge beyond it's rated amperage. The higher the controller setting, the longer the heater is on and the more heat it produces.

OPERATING COST:

The Holkamp, Portable model #101 Quartz Energy Saver is rated at 120 Volts, 1,500 watts, 12.5 amps, and uses 1½KW per hour of operation, on the high setting. If the heater is operated at one-half capacity, (the average warm setting) it would operate at ½ capacity and consume ¾KW per hour.

Electrical rates vary within each region, however it costs approximately 9¢ per hour to operate the Quartz Energy Saver on the high setting in Hartford, CT. To determine the exact operating cost in other regions of the country, check your utility company's cost per KW hour, and multiply this rate by 1½ (1,500 watts.)

FACTS: Page 2.

HEATING AREA SUFFICIENT:

The Quartz Energy Saver is designed to provide a 72 degree F comfort level in a home insulated for electric heat under the following conditions:
Outside temperture - -5 degrees
Ceiling height - 8'-0"
Exterior glass- thermopane or storm windows not exceeding 25% of exterior wall surfaces.
QUARTZ COVERAGE- 18 to 24 sq. ft. per 100 watts.
Model #101 P is designed to heat approximately 360 sq. ft. under the above conditions. Many users exceed this coverage.

MOST EFFECTIVE WAY TO USE THE QUARTZ ENERGY SAVER:

Position unit in the room where it will radiate clearly to the most objects. Point away from windows and other non-absorbing items. Turn the controller on high, remove chill from room, and turn down to desired comfort level.

SAFETY OF THE QUARTZ ENERGY SAVER:

Quartz Energy Savers have been extensively tested and approved for use by Underwriters Laboratory (UL). Portable models contain tip-over switches to automatically turn the unit off if knocked over, and a safety thermostat to regulate the room temperture.

WILL QUARTZ ENERGY SAVERS REDUCE HEATING COSTS?

Yes. Quartz Energy Savers are twice as efficient as conventional electric heat and users of fuel oil report extensive savings. Many customers that purchased an initial heater have purchased others to heat major portions of their home. Numerous customers use heat their entire home with QUARTZ ENERGY SAVERS. They are doing this because it is economical.

Quartz Energy Savers will save you money, we believe as high as 50% over existing home heating costs, however this is a direct function of your control over the rooms you heat, and how often you heat them. The Quartz Energy Saver permits you to decide when you want to heat a specific room. It is your room control.

PRODUCT GUARANTEE:

The Quartz Energy Saver is under warranty for one year from date of purchase, except for breakage of the quartz elements. It is designed for long life, with elements tested for over 9,000 heating hours. The quartz elements are replaceable at a current replacement cost of $14.00 per tube. Each unit contains two quartz elements.

NO:

Eliminate your concerns over potential fuel shortages, the high cost of home heating oil, deregulation of fuel oil and natural gas, and use the QUARTZ ENERGY SAVER, powered by low cost, readily available electricity. The QUARTZ ENERGY SAVER is clean, quiet and the sensible solution to efficient, effective heating.

To Effective and Efficient Heating.

BASIC FACTS ON QUARTZ HEATING AND ANSWERS TO QUESTIONS REGARDING IT.

WHY CONSIDER QUARTZ HEATING?

Conventional sources of energy (oil, electric baseboard, natural gas and firewood) are expensive. QUARTZ HEATERS are designed to provide instant heat, negating the need to extensively pre-heat areas to achieve comfort, thereby saving money for the user. QUARTZ HEATERS permit the user to heat living space only when in use.

WHO DEVELOPED QUARTZ HEAT?

German scientists developed QUARTZ HEATERS ten years ago to combat Europe's high cost of energy, resulting in efficient and effective heating used extensively today.

WHAT IS THE BASIC PRINCIPLE OF QUARTZ HEATING?

QUARTZ is one of four (Diamonds, rubies, charcoal and quartz) known elements in the world that produces pure radiant heat.

QUARTZ HEATERS utilize conventional electric resistance coils encased in quartz tubes to magnify and intensify heat, reflect it off a polished shield and radiate it to surrounding areas. This carefully designed combination of components produces instantaneous heat.

ARE QUARTZ HEATERS SAFE?

Yes. QUARTZ HEATERS have been extensively tested and approved for use by Underwriters Laboratories (UL).

HAS QUARTZ HEATING BEEN TESTED IN THE UNITED STATES?

QUARTZ HEATING has been used for residential and commercial purposes for four years in the United States with an extensive test market conducted in the Northeast during the winter of 1977-78. All users have been extremely satisfied with the results.

HOW DO QUARTZ HEATERS SAVE MONEY?

QUARTZ HEATERS provide instant heat within one minute of operation, rapidly raising room temperatures to the comfort level in 20 minutes, permitting users to reduce heating levels in unoccupied rooms until their planned use.

Each model QUARTZ HEATER contains a QUARTZ ENERGY SAVER CONTROLLER which cycles the flow of energy to the heating elements to reduce power consumption.

WHERE ARE QUARTZ HEATERS MOST EFFECTIVE?

In any living space. Users initially purchase QUARTZ HEATERS to solve specific heating problems in cold rooms. After initial use, they discover that QUARTZ HEAT is an economical solution to heating the entire house.

QUARTZ HEAT, for example, eliminates condensation on bathroom mirrors while showering

HOW MANY QUARTZ HEATERS ARE REQUIRED TO EFFECTIVELY HEAT A HOUSE?

This requirement varies depending on the house, its room sizes, amount of heat loss, ceiling heights, room configuration, etc. Suggests 100 watts per 18 to 22 sq. ft. for planning purposes.

recommends purchasing one QUARTZ HEATER for use in your most frequently occupied room. When the QUARTZ HEATER'S effectiveness is self proven then consider purchasing additional QUARTZ HEATERS for other areas. Keep in mind, each 1200 watt heater utilizes 10 AMPS of available capacity of a typical 15 or 20 AMP circuit

IS SERVICE READILY AVAILABLE FOR QUARTZ HEATERS?

Yes. QUARTZ HEATERS are guaranteed for one year from date of purchase, but are specifically designed for a long lifespan. Replacement parts and service is available, if necessary, fror

OTHER APPLICATIONS FOR QUARTZ HEATERS:

QUARTZ HEATERS are designed for effective use any place that people are cold. They should be considered for use in professional offices, restaurants, pleasure boats, mobile homes, garage workshops, laundry areas, patios, summer cottages and other areas.

NEW PRODUCT

"Quartz Energy Saver"™

"QUARTZ" HEATING

The sensible solution to effective ECONOMICAL heating.

The QUARTZ ENERGY SAVER™, EUROPE'S answer to efficient heating with high cost energy is now available in the United States.

Introducing the world's only vertical QUARTZ TUBE PORTABLE heater and built-in and surface mounted wall units.

They contain:

- Built-in ENERGY SAVING CONTROLLER for selection of desired comfort level to control and minimize consumption of electricity.
- Thermostatic control and safety TIP-OVER switch (portable models).
- Quality in design and workmanship.

Operates at 100% capacity for 5½¢ hour (based on Hartford, CT utility rate).

Designed for SAFETY, COMFORT, ECONOMY and a long lifespan.

Even distribution of heat.

Total comfort achieved in one minute.

Adequate heat for any room in the house. Ideal for 1000 uses.

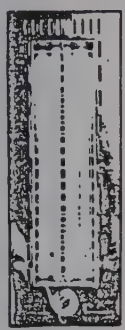
No installation required, just plug in any wall outlet. (Wall models designed for cord or direct wiring)

Effectively used, tested and proven in the Northeast.

ELIMINATES NEED TO MAINTAIN CONSTANT HEAT IN LIVING AREAS UNTIL ROOM IS IN USE.

CALL FOR NO OBLIGATION, HOME DEMONSTRATION.

UL approved — Guaranteed for [illegible] year.

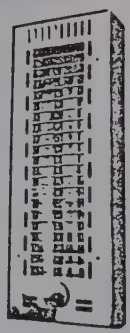


RECESSED MODEL #301R

SPECIFICATIONS AND COST:

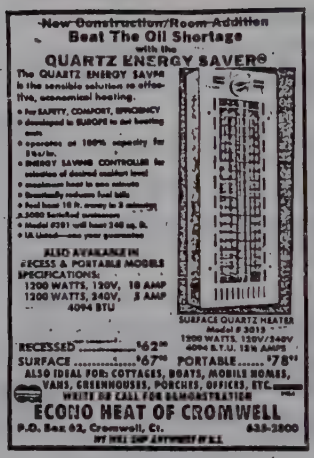
MODEL #	WATTS	VOLTS	AMPS	BTU	PRICE
101P	1500	110	12.5	5120	[illegible]
301R-120	1200	110	10	4094	89.95
301R 240	1200	220	5	4094	89.95
301S-120	1200	110	10	4094	74.95
301S 240	1200	220		[illegible]	[illegible]

PORTABLE MODEL #101



SURFACE MOUNTED MODEL #301S

Exclusively distributed by



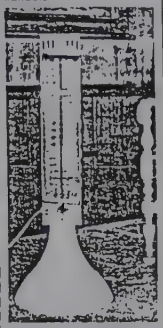
374051 Econo Heat of Cromwell REAL ESTATE home sect.

sun, may 27 don-43 46 proofs to 25 merge

New Concept In Efficient Heating
Reduce Home Heating Costs
and be totally comfortable

QUARTZ HEAT
The sensible solution to effective ECONOMICAL HEATING:

- For SAFETY, COMFORT EFFICIENCY
- developed in EUROPE to cut heating costs
- operates at 100% capacity for 5¼/hr. (based on Hartford region electric rate)
- ENERGY SAVING CONTROLLER for selection of desired comfort level
- thermostatic control
- safety TIP-OVER switch
- maximum heat in one minute
- NO INSTALLATION, plug in any outlet
- designed as principal heat system
- will solve any heating problem
- proven in NORTHEAST, winter 77-78
- UL listed one year guarantee



PORTABLE QUARTZ HEATER
Model # 101
1500 WATTS 120V
$72.50

30-Day Money - Back GUARANTEE

You must be satisfied with your QUARTZ HEATER'S performance or return anytime within 30 days for prompt refund of purchase price (except shipping & handling)

ECONO HEAT 23 MANGO CROMWELL CT

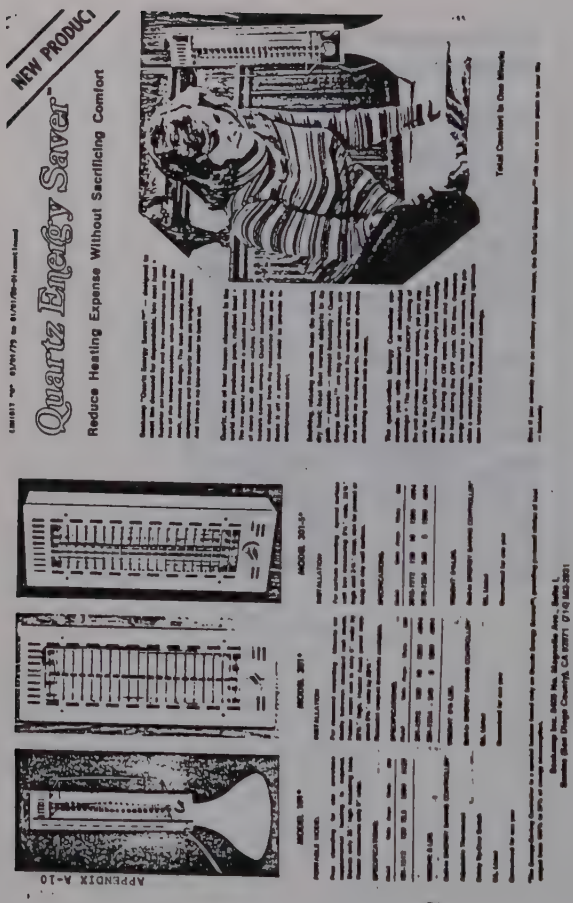
ECONO HEAT CROMWELL CT 06416
P.O. BOX 62 (203) 635-2800

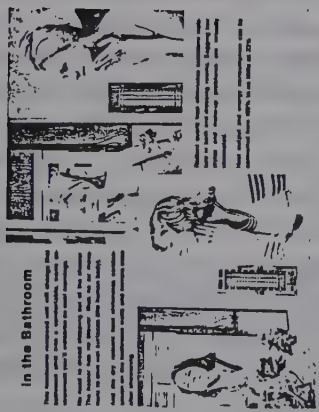
Please rush me:
☐ One Portable QUARTZ HEATER, model #101 at purchase price of $72.50 plus $2.00 shipping & handling.

Enclosed is ☐ check or
☐ money order for $ ____

CHARGE IT:
☐ VISA ☐ MASTER CHARGE

Credit Card # _____
Exp date ____ / ____
Conn. res. please add 7% sales tax
Name _____
Address _____
City _____
State _____ Zip _____


NEW PRODUCT
Quartz Energy Saver
Reduce Heating Expense Without Sacrificing Comfort
APPENDIX A-10



In the Bathroom

Portable Comfort — Anywhere

Soothing comfort for arthritic conditions

For that favorite new Room

On the Patio

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Energy Policy and Conservation Act, as amended; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Energy Efficient Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 330 Middle St., in the City of Middletown, State of Connecticut.

Respondents John P. White and Elaine B. Owen are officers of said corporation. They formulate, direct, and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

For the purposes of this Order, each of the terms listed below, as applied to the respondents named herein, is defined as follows:

1. A *competent and reliable scientific test* is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the professions to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization that conducts such tests as one of its principal functions, (b) by an agency or department of the state or federal government, or (c) persons employed or retained by respondents if they are qualified (as defined above in this paragraph) and can conduct and evaluate the test in an objective manner.

2. An *energy related claim* is any oral or written, general or specific, representation that, directly or by implication, describes or refers to the energy cost saving capability, energy saving capability, efficiency, conservation quality or insulating property of any product, or otherwise refers to the energy consumed or generated by any product.

II

It is ordered, That respondents, Energy Efficient Systems, Inc., a corporation, its successors and assigns, and its officers, and John P. White and Elaine B. Owen, individually and as officers of the corporate respondent, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the electric resistance heater now known as the Boekamp Quartz Energy Saver Heater ("Boekamp Heater"), or any other product for which an energy related claim is made, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Representing orally or in writing, directly or by implication, including through the use of testimonials that:

(i) the Boekamp Heater is more efficient or produces more heat than other electric resistance heaters of similar wattage;

(ii) the Boekamp Heater provides "free" heat of any kind at any time;

(iii) the Boekamp Heater is capable of heating objects which are far away from it in a short period of time;

(iv) the Boekamp Heater evenly distributes heat throughout a typical room;

(v) the quartz tubes contained in the Boekamp Heater are durable components;

(vi) the quartz tubes contained in the Boekamp Heater intensify or magnify the heat generated by the electricity sent through the resistance coils enclosed in the tubes, or that the quartz tubes in any way increase the amount of heat generated by the Boekamp Heater.

B. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, which relates to the heating capabilities, energy saving potential or other performance capabilities of the Boekamp Heater or making any energy related claim for any other product unless: (1) such representation is true, and (2) at the time of making such representation, the representation is fully and completely substantiated in writing by competent and reliable scientific tests which remain available for inspection by the staff of the Federal Trade Commission for at least three (3) years following the final use of the representation.

C. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, respecting the energy consumption of or the cost of energy consumed by the Boekamp Heater or any other covered product (as "covered product" is defined in Sections 321(a)(2) and 322 of the Energy Policy and Conservation Act, 42 U.S.C. 6291(a)(2) and 6292 or any amendment thereto) unless: (1) such substantiation includes tests conducted on the Boekamp Heater or other covered product in accordance with test procedures prescribed by the Secretary of the Department of Energy pursuant to Section 323 of the Energy Policy and Conservation Act, 42 U.S.C. 6293 or any amendments thereto, with complete written documentation of such tests remaining available for inspection by the staff of the Federal Trade Commission for at least three years following final use of the representation, and (2) such representation fairly discloses the results of such tests.

D. Misrepresenting orally or in writing, the purpose, content, or conclusion of any test or study pertaining to the Boekamp Heater or any product for which an energy related claim is made.

E. Using the term "energy saver", or any other words or phrases

of similar import or meaning, to name or designate the Boekamp Heater.

F. Representing orally or in writing, directly or by implication, including through the use of testimonials, that use of the Boekamp Heater or any product for which an energy related claim is made will result in any energy savings or energy costs savings unless there is clear and conspicuous disclosure, in close conjunction with such representation, of all circumstances and conditions that must be met if the purchaser is to experience similar savings.

G. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, in connection with the advertisement or promotion of the Boekamp Heater or any product for which an energy related claim is made, which is inconsistent in any material respect with any representation concerning the Boekamp Heater or other said product made, directly or by implication, in post-purchase materials supplied to the purchasers of the Boekamp Heater or other said product.

H. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, regarding the durability or life span of the Boekamp Heater, including representations regarding warranties or guarantees for the Boekamp Heater, or regarding any life tests performed on the quartz tubes or resistance coils, without disclosing in close conjunction therewith, in print at least as large as the print in which the representation is made, or in an oral presentation, in speech as clear and distinct as that delivered in the rest of the presentation, that the quartz tubes are: (1) fragile unless the quartz tubes are supported or protected in such a manner that they will not break when the Boekamp Heater is tipped over, and (2) not covered by the warranty or guarantee unless the quartz tubes are covered under the warranty or guarantee.

I. Representing, orally or in writing, directly or by implication, including through the use of testimonials, that the Boekamp Heater can heat or raise the temperature of a room, without disclosing in close conjunction therewith the following statement in print at least as large as the print in which the representation is made, or in an oral presentation, in speech as clear and distinct as that delivered in the rest of the presentation, with nothing to the contrary or in mitigation of this statement:

HEATING OR RAISING THE TEMPERATURE OF A ROOM IS ONLY POSSIBLE AFTER EXTENDED, CONTINUOUS USE OF THE BOEKAMP HEATER.

J. For the purpose of this Part II of the Order, when representations are made in television advertising which give rise to a required

disclosure, such disclosure must be made simultaneously in both audio and visual without any distracting sounds and with a clear background.

III

It is further ordered, That each respondent, within twenty (20) days from the date of service of this Order, send a copy of the letter attached hereto and marked as Exhibit A via first class mail to each individual, partnership, corporation or other business entity engaged in the resale or distribution of the Boekamp Heater to whom the respondents sent advertisements or promotional materials relating or referring to the Boekamp Heater which contained a representation or testimonial prohibited by this Order or omitted a disclosure required by this Order and whom respondents are able to locate. Respondents shall use their best efforts to locate all such individuals, partnerships and corporations.

IV

It is further ordered, That respondents forthwith deliver a copy of this Order to: (1) all present and future employees, agents and representatives engaged in any way in the advertising, promotion, offering for sale, sale or distribution of the Boekamp Heater or any other product for which an energy related claim is made; and (2) all present and future individuals, partnerships; corporations or other business entities to whom any of the respondents sell or distribute the Boekamp Heater or any other apparatus designed to provide heat or warmth and which are engaged in the resale or distribution of the Boekamp Heater or other said product; and that respondents secure a signed statement acknowledging receipt of the Order from each such person or entity referred to herein.

V

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his/her present business or employment and of his/her affiliation with a new business or employment. In addition, for a period of ten (10) years from the date of service of this Order each individual respondent shall promptly notify the Commission of his/her affiliation with a new business or employment whose activities include the manufacture, purchase, advertising, promotion, offering for sale, sale or distribution of any product for which an energy related claim

is made, or of his/her affiliation with a new business or employment in which his/her duties and responsibilities involve the manufacture, purchase, advertising, promotion, offering for sale, sale, or distribution of any product for which an energy related claim is made. Such notice shall include each respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of all duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this Order.

VI

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

VII

A. *It is further ordered,* That respondents shall maintain all records that relate to any compliance obligations arising out of this Order for a period of not less than three (3) years and shall make such records available to the staff of the Commission.

B. *It is further ordered,* That each respondent shall within sixty (60) days after service upon them of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

Date
330 Middle Street
Middletown, Connecticut 06457
(203) 635-2800

RE: Recall of Advertisements and Promotional Materials

Dear Customer:

Some time ago as the distributor for Boekamp, Inc. we distributed

to you advertisements and promotional materials concerning the Boekamp Quartz Energy Saver Heater. These materials contained a number of performance claims about the Boekamp Heater. As a result of an investigation regarding these claims by the Federal Trade Commission, we have entered into the enclosed Consent Agreement and Order.

We have agreed to recall all past advertisements and promotional materials regarding the Boekamp Heater which contain claims prohibited by the Order or which omit the disclosures required by the Order. To assure that no prohibited advertisements or promotional materials continue to be utilized, it is important that you return to us whatever advertisements and promotional materials you have received from us in the past.

Thank you for your attention.

Sincerely,

John P. White, President
Energy Efficient Systems, Inc.

In the Matter of

BOEKAMP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3063. Complaint, April 9, 1981—Decision, April 9, 1981

This consent order requires, among other things, a San Diego, Calif. firm and its corporate officer engaged in the manufacture, sale and distribution of an electric space heater known as the "Boekamp Quartz Heater" to cease misrepresenting the efficiency, energy savings, performance characteristics and durability of the product. Respondents are further prohibited from making any energy-related advertising claim without reliable substantiation and barred from using the term "energy saver" or similar terms in product names. The order additionally requires respondents to send a copy of a prescribed letter to all individuals or business entities engaged in the sale of the Boekamp Quartz Heater advising them of the terms of the order and requesting the return of all advertisements or promotional material which contain prohibited claims or which fail to include required disclosures.

Appearances

For the Commission: *Joan Gerrity, John B. Gatlin* and *Douglas M. Husid.*

For the respondent: *Michael Steres, Feldman & Steres,* San Diego, Calif., and *John T. Coyne* and *William Barton, Carr, Jordan, Coyne & Savits,* Washington, D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and of the Energy Policy and Conservation Act, as amended, and by virtue of the authority vested in it by those Acts, the Federal Trade Commission, having reason to believe that Boekamp, Inc., a corporation, and Konrad Boekamp, individually and as an officer of the corporation, hereinafter sometimes referred to collectively as respondents, have violated the provisions of the Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Boekamp, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 8221 Arjons Drive, San Diego, California.

Respondent Konrad Boekamp is an officer of the corporate

respondent named herein. He formulates, directs and controls the acts and practices of the corporate respondent hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, advertising, promotion, offering for sale, sale and distribution of a product known as the Quartz Energy Saver Heater ("Heater").

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the Heaters to be shipped from their place of business in the State of California to purchasers throughout the United States. Respondents now disseminate and cause the dissemination of, and for some time last past have disseminated and caused the dissemination of, certain advertisements and promotional materials concerning the Heater by use of the United States mail and have advertised the Heater in newspapers of interstate circulation. Accordingly, respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The advertisements and promotional materials referred to in Paragraph Three include, but are not limited to, the materials marked as Appendix A and attached hereto.

I

PAR. 5. By and through the use of the aforementioned advertisements and promotional materials, respondents have represented and are now representing, directly or by implication, that:

a. the Heater is twice as efficient as conventional electric resistance heaters;

b. the Heater will provide two to three times as much heat as conventional electric resistance heaters of similar wattage;

c. the Heater provides "free" heat because its quartz tubes do not cool down during the Heater's off cycle;

d. the Heater is capable of heating objects which are far away from it in a short period of time;

e. the Heater evenly distributes heat throughout a typical room;

f. the quartz tubes contained in the Heater intensify and magnify the heat generated by the electricity sent through the resistance coils enclosed in the tubes;

g. the quartz tubes contained in the Heater are durable components.

PAR. 6. In truth and in fact, contrary to respondents' representations set forth in Paragraph Five:

a. the Heater is not twice as efficient as conventional electric resistance heaters. All electric resistance heaters produce the same number of British Thermal Units ("BTUs") of heat per watt;

b. the Heater will not provide two to three times as much heat as conventional electric resistance heaters of similar wattage;

c. the quartz tubes contained in the Heater do cool down during the Heater's off cycle and the Heater does not provide "free" heat for the foregoing reason or for any other reason;

d. the Heater is not capable of heating objects which are far away from it in a short period of time. The Heater will only be able to heat objects far away from it if the Heater has been operated for a lengthy period of time so that the air space between the Heater and the object has itself been heated;

e. the Heater does not evenly distribute heat throughout a typical room;

f. the quartz tubes contained in the Heater do not intensify or magnify the heat generated by the electricity sent through the resistance coils enclosed in the tubes. The quartz tubes only transfer the heat generated by the resistance coils;

g. the quartz tubes contained in the Heater are not durable components. The quartz tubes are fragile elements which shatter easily on impact when the tubes are hot.

Therefore, said advertisements and promotional materials were, and are false, deceptive, misleading or unfair.

II

PAR. 7. By and through the use of the aforementioned advertisements and promotional materials, respondents have represented and are now representing, directly or by implication, in addition to those representations set forth in Paragraph Five, that:

a. a typical user of a Heater will save 50% over his/her prior home heating costs;

b. a typical user of a Heater will drastically reduce his/her fuel bills while maintaining personal comfort;

c. users of the Heater report dramatic utility bill savings;

d. a single Heater will raise the temperature in an unheated room of typical size to a comfortable temperature in twenty minutes;

e. when the outside temperature is 5 degrees Fahrenheit, one

1500 watt Heater will maintain a room temperature of 72 degrees Fahrenheit under certain stated conditions;

f. the Heater will heat a typical room more quickly than conventional electric resistance heaters;

g. the Heater provides special comfort to arthritics and others suffering from similar ailments.

PAR. 8. At the time respondents made the representations alleged in Paragraphs Five and Seven they did not possess and rely upon a reasonable basis for such representations. Therefore, the aforementioned advertisements and promotional materials were, and are, unfair, deceptive, or misleading.

PAR. 9. By and through the use of the aforementioned advertisements and promotional materials, respondents have represented and are now representing, directly or by implication, that they had a reasonable basis for the representations alleged in Paragraphs Five and Seven at the time they were made. In truth and in fact, respondents had no reasonable basis for the representations alleged in Paragraphs Five and Seven. Therefore, said advertisements and promotional materials were, and are, deceptive, misleading or unfair.

III

PAR. 10. In the course and conduct of their business, respondents have used the term "Quartz Energy Saver" to refer to the Heater in the aforementioned advertisements and promotional materials. By and through the use of that term, respondents have represented and are now representing, directly or by implication, that the Heater consumes less electricity than other electric resistance heaters in providing the same amount of heat.

PAR. 11. In truth and in fact, contrary to respondents' representation set forth in Paragraph Ten, the Heater provides the same number of BTUs per watt as any other electric resistance heater. Therefore, the use of the term "energy saver" to refer to the Heater was, and is, deceptive, misleading or unfair.

IV

PAR. 12. By and through the use of the aforementioned advertisements and promotional materials, respondents have represented and are now representing, directly or by implication, that the Heater will quickly and efficiently heat a whole room. In contrast, the operating instructions for the Heater, which are provided to consumers after

they purchase a Heater, caution users to avoid trying to heat a whole room with the Heater.

PAR. 13.

(a) The operating instruction referred to in Paragraph Twelve is a material fact in light of the representation made in advertisements and promotional materials as set forth in Paragraph Twelve. The aforementioned advertisements and promotional materials fail to disclose this material fact. Therefore, said advertisements and promotional materials were, and are, deceptive, misleading or unfair.

(b) The operating instruction referred to in Paragraph Twelve is materially inconsistent with the representation made in advertisements and promotional materials as set forth in Paragraph Twelve. Therefore, said advertisements and promotional materials were, and are, deceptive, misleading or unfair.

V

PAR. 14. The Heater is an unvented electric resistance heater which falls within the category of products defined as "unvented home heating equipment" in 10 C.F.R. 430.2 and as such is a "covered product" as that term is defined in Sections 321(a)(2) and 322 of the Energy Policy and Conservation Act, 42 U.S.C. 6291(a)(2) and 6292.

PAR. 15. In the course and conduct of their business, on and after November 10, 1978, respondents have made, and continue to make, representations, directly or by implication, respecting the energy consumption of the Heater or the cost of energy consumed by the Heater, including the representations set forth at subparagraphs (a), (b) and (c) of Paragraph Five.

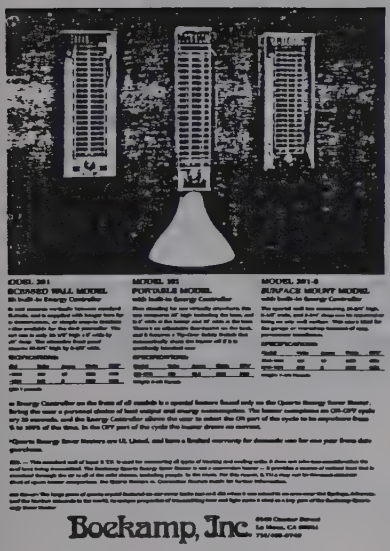
The aforesaid representations do not fairly disclose the results of tests conducted on the Heater in accordance with the test procedures applicable to "unvented home heating equipment" as prescribed by the Secretary of the Department of Energy at 10 C.F.R. 430.22(g) and 10 C.F.R. Subpart B, Part 430, Appendix G. Therefore, and pursuant to 42 U.S.C. 6293(c) and 6303(c), the representations were, and are, deceptive, misleading or unfair.

PAR. 16. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with individuals, firms, and corporations engaged in the manufacture, distribution and sale of space heaters and other products for which energy related claims are made.

PAR. 17. The use by respondents of the aforementioned false, deceptive, misleading or unfair representations, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that the representations were and are true and complete, and into the purchase of substantial quantities of the Heater by reason of this erroneous and mistaken belief.

PAR. 18. The acts and practices of respondents, as herein alleged, were and are to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

APPENDIX A

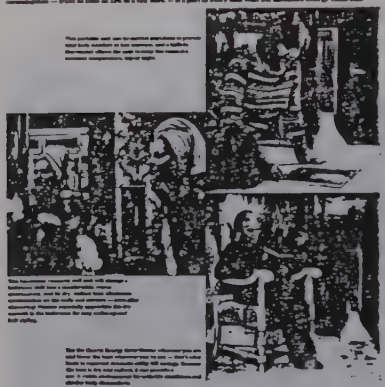


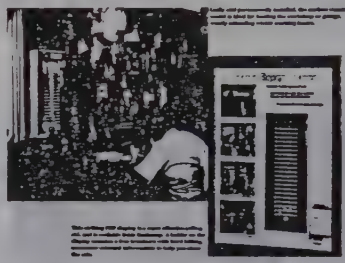
FAMILY "C": 07/01/79 to Present

Introducing a Space Heater
Like You've Never Sold Before

Boekamp, Inc.

Quartz Energy Saver™ Heater



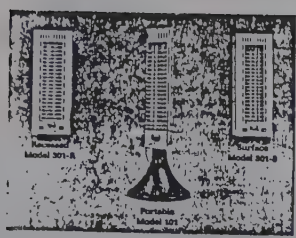


Quartz Heaters Are Different . . .

Quartz Heaters

Convection Heaters

APPENDIX A-2



	Model	Volts	Amps	Watts	BTU
PORTABLE MODEL	101-1214	120	12.5	1500	5120
RECESSED WALL MODEL	301S-1212	120	10	1200	4094
	301R-1234	240	5	1200	4094
SURFACE MOUNT MODEL	301S-1212	120	10	1200	4094
	301R-1234	240	5	1200	4094

All models feature the exclusive Energy Controller and are fully UL Listed. Portable model features 3 prong grounded plug.

Designed to help you combat the high cost of energy while providing comfort and style in localized heating . . . get your Boekamp Quartz Energy Saver™ Heater today!

USES:

Living Rooms
Bathrooms
Workshops

Stables/Barns
RVs/Motorhomes
Family Rooms
Offices

Patios
Boats
Mobile Homes

Quartz Energy Saver™ Heater

Boekamp, Inc.

San Diego, California

Available from:

© 1980 BOEKAMP, INC. Printed in U.S.A. Form No. 100720

Introducing a Space Heater Like You've Never Used Before

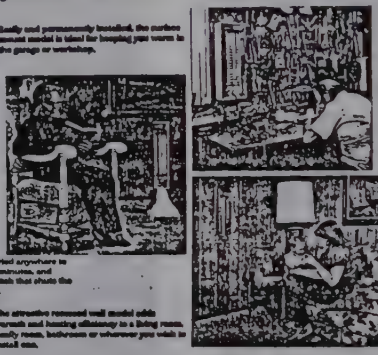
Boekamp

Boekamp®...The ORIGINAL Quartz Energy Saver® Heater

Designed and developed to combat the high costs of energy, the U.S. made Boekamp Heater is the sensible solution to effective, efficient heating. Features:

- Total personal comfort in just minutes
- Deeply pleasing, infrared radiant heat
- Heat projected by polished reflector — no fan or blower necessary
- Localized warmth allows temperature and cost of heating rest of house to drop
- Exclusive Energy Controller offers precise control of heat output and energy consumption

Easily and permanently installed, the surface mount model is ideal for keeping you warm in the garage or workshop.



This portable unit can be carried anywhere to provide body comfort in just minutes, and features a Tip-Over Safety Switch that shuts the heater off if it is knocked over.

The attractive recessed wall model adds warmth and heating efficiency to a living room, family room, bedroom or wherever you wish to install one.

Quartz Heaters are Different . . .

BOEKAMP QUARTZ ENERGY SAVER®

- Room is quickly warmed to an even, comfortable temperature
- Heat is efficiently projected through the air to solid objects by highly polished reflector; there's no need for circulating air
- Temperature difference between floor and ceiling — usually less than 10°.
- Average coil temperature — approximately 1600°
- Room comfort is achieved quickly because people and objects are warmed directly
- Room comfort is maintained easily because objects are heated and re-emit heat; natural air leaks have a minimal effect on comfort [illegible]

OLD-FASHIONED CONVECTION HEATERS

- Room is slowly heated from top down because hot air rises
- Heat is directed into the room by fan, or rising hot air only; the air must then heat the objects in the room
- Temperature difference between floor and ceiling — usually 20° to 30°
- Average coil temperature — approximately 1200°
- Room comfort is achieved slowly because air must first be heated, then objects and people are heated
- Room comfort is maintained inefficiently because of heat loss through the ceiling and natural air leaks throughout the room

JP 117 "B" 05/04/79 Bo Present

COMPARATIVE ANALYSIS

QUARTZ HEATERS vs CONVENTIONAL-TYPE HEATERS

Prepared by:

Malcolm D. Campbell
Senior Staff Scientist
Materials Research

Conducting tests to quantitatively compare the performances of quartz heaters versus convection-type heating is difficult because of the infinite number of possible combinations of variables. This is further complicated by the difficulty of assessing human responses. However, any heater serves only one purpose — to provide comfort to people and herein lies the basic differences between the Boekamp Quartz Energy Saver Heater and the typical convection-type electric heater.

Most electric heaters circulate a small portion of the room air over the heating elements. This is accomplished with either natural convection or a fan which pulls cold air into the heater and pushes warmed air out. Convection is the vertical movement of warm air as it heats and becomes lighter and is then replaced by in-flowing cold air. It requires large heater areas to move sufficient air to produce reasonable temperature elevation. Fan-driven designs are noisy, but can be more compact in size.

Both types produce a comfortable living environment by raising the temperature of the entire volume of air in the room. In the process, however, they must also heat the contents of the room over which the air flows. Once the room is warmed, the heater continues to consume power to make up for inherent heat losses from the area.

A convection-type heater relies on the air being heated as it passes through the heater. The hot air, being lighter in density, rises to the ceiling. Although objects are warmed by the circulating air, the room, in general, heats from the top down. When the air temperature just a few feet off the floor is comfortable for people, the air temperature near the ceiling (where it is not needed) may be as much as 30 degrees higher. This results in a high percentage of the energy consumed being lost through ceilings and upper walls.

The quartz infra-red heater consists of a coil of special resistance wire encased in a quartz tube. The coil is heated to a temperature range between 1800 and 2000 degrees Fahrenheit — a temperature that exceeds the coil temperature of a convection-type heater by as much as 500 degrees. At these temperatures, most of the electrical energy supplied is converted into electromagnetic radiation, which is emitted from the coil. The "glow" of any hot wire is the radiation which is in the visible range, i.e., detectable by the human eye. However, this is less than one percent of the total radiation emitted. Most of the remainder is in the "infra-red" region.

Quartz is used for several specific reasons: 1) it supports and protects the hot coil and will survive the excessive operating temperatures; 2) it is totally heat efficient, virtually eliminating any heat loss from the coil and 3) is relatively transparent to the infra-red radiation.

The quartz elements are mounted in front of a high-efficiency reflector so that nearly all of the radiant heat generated is beamed in the desired direction. Contrary to the mode of operation of the typical convection-type heater, very little of the room air is heated directly. However, the radiation emitted from the quartz heater passes through the air with only minimal energy (heat) loss and strikes any solid object in its path. When this happens, the radiation is "absorbed" and objects are heated. These objects, in turn, emit heat.

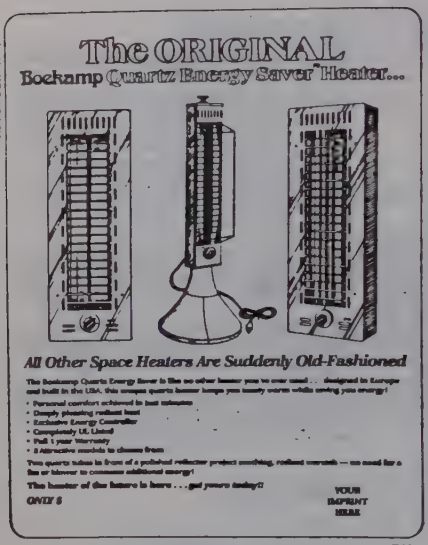
The basic difference in mode of operation: Quartz versus Convection; accounts in several ways for the reduced cost of operating a quartz heater. First, with quartz heat, the objects in the room (including people) are heated to comfortable levels long before the room temperature would provide a comfortable environment. Thus, the quartz heater uses less energy to provide body comfort. There is a tremendous advantage in the energy savings since the instant response of the quartz heater eliminates the costly efforts of pre-heating an area to be [illegible]

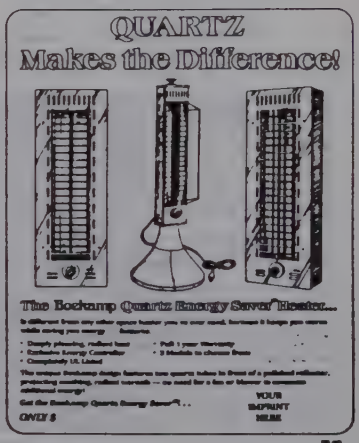
Only a small amount of the energy consumed by a well-designed quartz heater is expended in excessive heating of the air in the vicinity of the heater. Therefore, there is much less of a temperature difference from floor to ceiling and the ceiling temperature and heat losses are considerably less. With the people being heated directly by radiant heat, the overall air temperature can be very low, which minimizes heat losses through the walls and ceilings, as well as floors. These facts are primarily responsible for the lower power consumption required to maintain the comfort level once it has been reached.

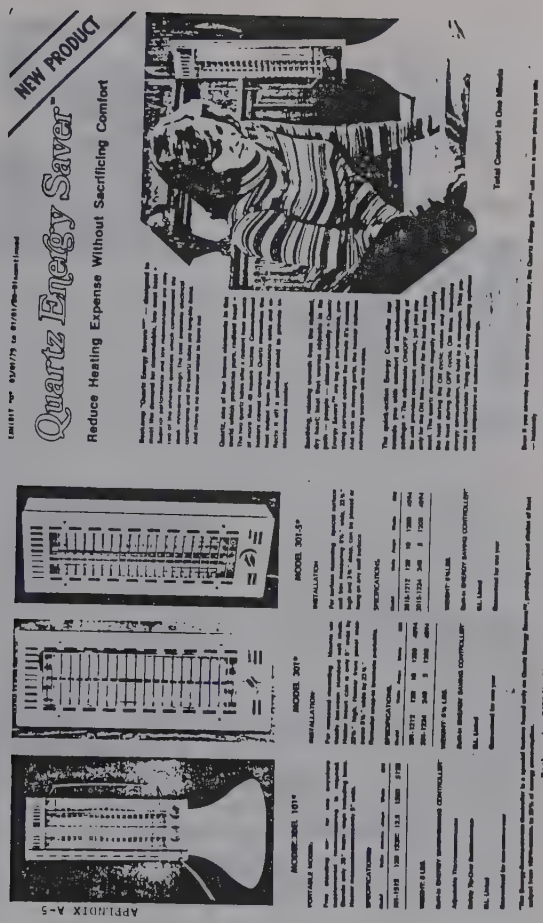
As with any heating system, quartz heaters must be properly installed and used to the full advantage of their inherent features. Since radiant heat is directional heat, use of two small quartz heaters with energy saving features, to heat a large room from both directions is more efficient than one large heater. They should also be directed away from windows and all other sources of great heat loss. These practices will further enhance the efficiency of the unit.

In conclusion, in a typical residential situation, advanced design quartz infra-red heaters, such as those manufactured by Boekamp, Inc., can provide satisfactory comfort levels at half or less the normal operating costs of other types of electric heating. The unparalleled performance of the quartz heater enables the user to achieve immediate local comfort levels without the anticipated and costly luxury of having to heat the whole house to be comfortable in just one room or area.

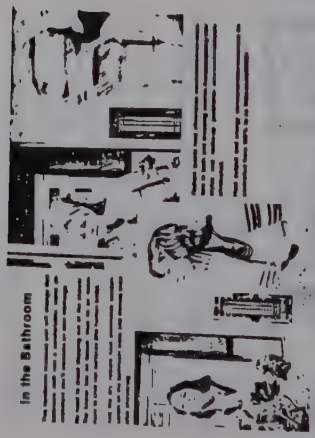
APPENDIX A-4


The ORIGINAL
Bockamp Quartz Energy Saver Heater...
All Other Space Heaters Are Suddenly Old-Fashioned
• Personal comfort achieved in just minutes
• Deeply pleasing radiant heat
• Exclusive Energy Controller
• Completely UL Listed
• Full 1 year Warranty
• 3 Attractive models to choose from
The heater of the future is here . . . get yours today!!
ONLY $
YOUR IMPRINT HERE


QUARTZ
Makes the Difference!
The Bockamp Quartz Energy Saver Heater...
• Deeply pleasing, radiant heat
• Exclusive Energy Controller
• Completely UL Listed
• Full 1 year Warranty
• 3 Models to choose from
ONLY $
YOUR IMPRINT HERE


NEW PRODUCT
Quartz Energy Saver
Reduce Heating Expense Without Sacrificing Comfort
Total Comfort In One Minute
MODEL 101
MODEL 201
MODEL 301-S
INSTALLATION
SPECIFICATIONS
WEIGHT: 7 LBS.
Boekamp Inc. 3400 Nw. Magnolia Ave., Suite L
Sanford (San Diego County), CA 92071 (714) 563-2981

APPENDIX A-5


In the Bathroom

Portable Comfort —
Anywhere

For that favorite new Room!

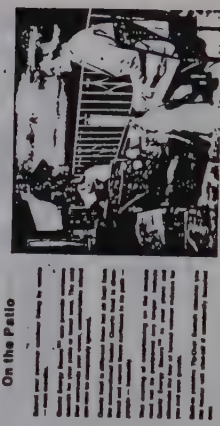

On the Patio

EXHIBIT "M" APPENDIX A-6

new from: Boekamp, Inc.

press release by

Fall Enterprises Inc.

8733 Magnolia Avenue
Suite 901
Santee, California 92071

QUARTZ ENERGY SAVER HEATER INTRODUCED BY BOEKAMP

The new Quartz Energy Saver Heater has just been released by Boekamp, Inc. of La Mesa, California after 5 years of development and testing. Quartz heaters, an effective and efficient means of localized heating, have been used in Europe for over 15 years to combat the high costs of heat and energy. Of the few quartz heaters manufactured in the U.S., none were designed to operate in the upright or vertical position. But the unique Quartz Energy Saver Heater, which is fully UL Listed, does operate vertically. It carries a 1 year limited warranty for domestic use, and is now available for warming the home, office, patio, workshop, or wherever localized heating is desired.

The heater functions by electrically heating two quartz tube elements that produce a deep-heating, radiant heat. The quartz tubes are positioned in front of a highly polished, corrosion-resistant aluminum reflector which effectively projects the heat into the room, eliminating the need for a fan or blower. The heater quickly and effectively heats everything in its path, including furniture, carpets, draperies, and people, providing total localized comfort in just minutes. As the heater creates a comfortable environment in the part of the house being occupied, the heat level in the rest of the house is allowed to drop, offering potentially tremendous savings in utility expenses.

The Quartz Energy Saver Heater, with suggested retail prices ranging from $59.90 to $79.90, is available in three models, including one free-standing floor model and two wall models. Of the two wall units, Model 301 mounts flush or recessed and model 301-S attaches to the surface of the wall. These two can run on either 120V or 240V current, are rated at 1200 Watts, and have a BTU rating of 4094.

Free-standing Model 101 comes with its own attractive stand and runs on regular 120V house current. With its 1500 Watt current draw, it is rated at 5120 BTUs and has a thermostat which can be set to prevent overheating. In addition, it features a Tip-Over Safety Switch that automatically shuts the unit off in the event the heater is accidentally upset.

The Energy Controller mounted on the face of all three models offers the user wide control over the heat output and energy consumption of the Quartz Energy Saver Heater. It works by cycling the heater on and off over a 30-second period, allowing the heater to be in the on part of the cycle from 25% to 100% of the time. And even though there is no current draw when the heater is in the off part of the cycle, the radiant heat from the hot quartz tubes continues to warm the environment. The Energy Controller can also offer substantial savings in the heater's consumption of electricity. For example, the floor model left on for one hour at a 50% setting would draw only 750 Watts/hour instead of the full 1500 Watts/hour. With most users finding that the heater maintains a comfortable personal environment at a setting of 50% or less, these savings can really add up.

For more information on the Quartz Energy Saver Heater and where to find one, contact:

BOEKAMP, INC.
8140 Center Street
La Mesa, CA 92041

EXHIBIT "A" 03/01/79 to Present

APPENDIX A-7

BOEKAMP INC.

8400 Magnolia Avenue, Suite "I" • Santee, California 92071
Telephone (714) 562-2931

FACT SHEET

BOEKAMP QUARTZ -- QUIET COMFORT

Why buy the Boekamp quartz heater when a conventional heater with a blower can be purchased at a lesser cost? A logical question which requires sound, logical answers; and here they are.

The Boekamp quartz heater is a high-value, worthwhile buy for so many reasons. Here are just a few: the type of heat; the quantity of heat; the trouble-free, long-life characteristics of the heater and the economical operation of the unit.

The heater produces radiant, dry heat; heat that warms objects in its path -- people -- almost instantly. Personal comfort is obtained immediately without heating large quantities of space; though the space is subsequently warmed as a result. The heater is designed for people and because the heat is dry and radiant, it's of great comfort to arthritics and others suffering from similar body discomforts. Quiet comfort; no blower, no noise. Because no blower is used, evaporative cooling of wet surfaces (the human body) is minimized and not increased by the constant movement of air. And the radiant, dry heat serves to prevent mirrors from fogging; eliminates sagging hair styles and ladies' make-up problems.

The quartz heater generates more heat because it operates at higher temperatures than the conventional electric heater and the surface area of the quartz tubing is much greater than that of an electric strip or coil heater. The superior quality of wire used in the element of the Boekamp heater and the inherent heating capabilities of the quartz permit much higher operating temperatures without jeopardizing the efficiency or the life of the unit. The two quartz tubes offer more than 40 square inches of radiant heat source area. The heat source area of the conventional heater does not compare.

Our heater is trouble-free. The best available electrical components and the quartz tubes are long-life items. There is absolutely no blower motor to fail.

The Boekamp heater is most economical to operate. The energy-saving controller permits ON/OFF cycling of the unit, and you pay the utility company ONLY for the "ON" time -- ONLY for the heat that you need. The quartz elements retain and radiate heat during the "OFF" cycle, thus "ON" time can be held to a minimum. Likewise, energy consumption is held to a minimum. At the same time, optimum room temperature is attainable.

The ease of installation of the wall units and the true portability of the portable units, combined with their attractive appearance and their energy-saving capabilities make them valuable and worthwhile investments. But these things are obvious -- those mentioned above may not be.

*QUIET, RADIANT HEAT **INTENSE HEAT ***TROUBLE-FREE ****ECONOMICAL

~~New Construction/Room Addition~~

Beat The Oil Shortage

with the

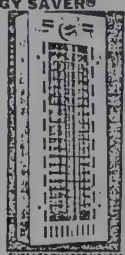
QUARTZ ENERGY SAVER®

The QUARTZ ENERGY SAVER is the sensible solution to effective, economical heating.

- For SAFETY, COMFORT, EFFICIENCY
- developed in EUROPE to cut heating costs
- operates at 100% capacity for 5 hrs/hr.
- ENERGY SAVING CONTROLLER for selection of desired comfort level
- maximum heat in one minute
- Drastically reduces fuel bills
- Feel heat 10 ft. away in 2 minutes
- 5,000 Satisfied customers
- Model #3011 will heat 240 sq. ft.
- UL Listed—also your guarantee

ALSO AVAILABLE IN RECESS & PORTABLE MODELS

SPECIFICATIONS:
1200 WATTS, 120V, 10 AMP
1200 WATTS, 240V, 5 AMP
4094 BTU



SURFACE QUARTZ HEATER
Model # 3015
1200 WATTS, 120V/240V
4094 B.T.U. 13½ AMPS

RECESSED $62.50
SURFACE $67.95
PORTABLE $78.95

ALSO IDEAL FOR: COTTAGES, BOATS, MOBILE HOMES, VANS, GREENHOUSES, PORCHES, OFFICES, ETC.

WRITE OR CALL FOR DEMONSTRATION

ECONO HEAT OF CROMWELL

P.O. Box 62, Cromwell, Ct. 635-2800

WE WILL SHIP ANYWHERE IN U.S.

374051 Econo Heat of cromwell REAL ESTATE home sect.

sun, may 27 den-43 46 proofs to 25 marge

APPENDIX A-9

New Concept In Efficient Heating
Reduce Home Heating Costs
and be totally comfortable

QUARTZ HEAT
The sensible solution to effective
ECONOMICAL HEATING:

- For SAFETY, COMFORT, EFFICIENCY
- developed in EUROPE to cut heating costs
- operates at 100% capacity for 5¼¢/hr (based on Hartford region electric rate)
- ENERGY SAVING CONTROLLER for selection of desired comfort level
- thermostatic control
- safety TIP-OVER switch
- maximum heat in and minute
- NO INSTALLATION plug in any outlet
- designed as principal heat system
- will solve any heating problem
- proven in NORTHEAST winter 77-78
- UL listed one year guarantee

ECONO HEAT CROMWELL CT 06416
P.O. BOX 62 (203) 635-2800
Please rush me:
☐ One Portable QUARTZ HEATER, model #101 at purchase price of $72.50 plus $2.00 shipping & handling
Enclosed is ☐ check or
☐ money order for $____
CHARGE IT:
☐ VISA ☐ MASTER CHARGE
Credit Card # _____
Exp. date ____ / ____
Conn. res. please add 7% sales tax
Name _____
Address _____
City _____
State _____ Zip _____

PORTABLE QUARTZ HEATER
Model # 101
1300 WATTS 120V
$72.50

30-Day Money Back GUARANTEE
You cannot be satisfied with your QUARTZ HEATER'S performance or return anytime within 30 days for prompt refund of purchase price (except shipping & handling).

ECONO HEAT 35 MARGO CROMWELL CT

APPENDIX A-10

NEW PRODUCT

"Quartz Energy Saver"™

"QUARTZ" HEATING

The sensible solution to effective ECONOMICAL heating.

The QUARTZ ENERGY SAVER™, EUROPE'S answer to efficient heating with high cost energy is now available in the United States.

Introducing the world's only vertical QUARTZ TUBE PORTABLE heater and built-in and surface mounted wall units.

They contain:

- Built-in ENERGY SAVING CONTROLLER for selection of desired comfort level to control and minimize consumption of electricity.
- Thermostatic control and safety TIP-OVER switch (portable models).
- Quality in design and workmanship.

Operates at 100% capacity for 5½ hour (based on Hartford, CT utility rate).

Designed for SAFETY, COMFORT, ECONOMY and a long lifespan.

Even distribution of heat.

Total comfort achieved in one minute.

Adequate heat for any room in the house. Ideal for 1000 uses.

No installation required, just plug in any wall outlet. (Wall models designed for cord or direct wiring)

Effectively used, tested and proven in the Northeast.

ELIMINATES NEED TO MAINTAIN CONSTANT HEAT IN LIVING AREAS UNTIL ROOM IS IN USE.

CALL FOR NO OBLIGATION, HOME DEMONSTRATION.

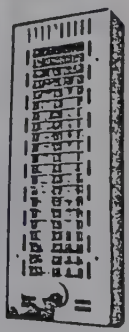
UL approved — Guaranteed for [illegible] year.

RECESSED MODEL #301R

SPECIFICATIONS AND COST:

MODEL #	WATTS	VOLTS	AMPS	BTU	PRICE
101P	1500	110	12.5	5120	[illegible]
301R-120	1200	110	10	4094	69.95
301R-240	1200	220	5	4094	69.95
301S-120	1200	110	10	4094	74.95
301S-240	1200	220	[illegible]	[illegible]	[illegible]

PORTABLE MODEL #101



SURFACE MOUNTED MODEL #301S

Exclusively distributed by

APPENDIX A-11

"QUARTZ HEATERS," the complete solution to efficient, effective heating.

BASIC FACTS ON THE ROBLAMP "QUARTZ ENERGY SAVER"

HEATING PRINCIPLE:

The Quartz Energy Saver heats objects instead of air. Every object (people) absorbs and gets off heat. This unique concept in heating is commonplace in Europe, but relatively new in the United States.

INSTANT HEAT:

The Quartz Energy Saver achieves maximum heating capacity in less than one minute. This eliminates the necessity to pre-heat rooms to comfort levels prior to use, thereby reducing your cost of energy.

OPERATING EFFICIENCY:

Test reports indicate the Quartz Energy Saver produces twice as much heat as conventional convection electric heating systems of similar voltage. No energy is wasted in the Quartz Energy Saver, and no fan (which cools down heaters) is required to move heat to far away objects. The combination of Quartz and radiant heat has produced a Quartz Energy Saver capable of providing up to three times as much heat over conventional fan driven electric heaters.

QUARTZ ELEMENT:

The Quartz Energy Saver operates on the highest level of the infrared spectrum, producing temperatures up to 2,000 degrees Fahrenheit within the quartz elements. The heat is radiated from the elements and the reflection screen at an angle of 170 degrees off the face of the heater. Radiant heat will not bend around corners and objects in direct line of sight will absorb greater amounts of heat. The Quartz Energy Saver is capable of radiating heat to objects 30' away.

ENERGY SAVING CONTROLLER:

The Quartz Energy Saver is equipped with a controller which time cycles power to the quartz elements. The electrical input can be controlled in 13 positions from the low to high setting, permitting the flow of electrical current from 25 to 100% of the time. This permits the user to set there desired comfort level. Quartz elements do not cool down during the off (no energy) cycle, thereby "free" heat is provided during this time period. The Quartz Energy Saver does not surge beyond it's rated amperage. The higher the controller setting, the longer the heater is on and the more heat it produces.

OPERATING COST:

The Roblamp, Portable model #101 Quartz Energy Saver is rated at 120 Volts, 1,500 watts, 12.5 amps, and uses 1½KW per hour of operation, on the high setting. If the heater is operated at one-half capacity, (the average users setting) it would operate at ½ capacity and consume ¾KW per hour.

Electrical rates vary within each region, however it costs approximately ½ c per hour to operate the Quartz Energy Saver on the high setting in Hartford, CT. To determine the exact operating cost in other regions of the country, check your utility company's cost per KW hour, and multiply this rate by 1½ (1,500 watts.)

FACTS: Page 2.

HEATING AREA COVERAGE:

The Quartz Energy Saver is designed to provide a 72 degree F comfort level in a home insulated for electric heat under the following conditions:
Outside temperture - -5 degrees
Ceiling height - 8'-0"
Exterior glass- thermopane or storm windows not exceeding 25% of exterior wall surfaces.

QUARTZ COVERAGE- 18 to 24 sq. ft. per 100 watts.
Model #101 F is designed to heat approximately 360 sq. ft. under the above conditions. Many users exceed this coverage.

MOST EFFECTIVE WAY TO USE THE QUARTZ ENERGY SAVER:

Position unit in the room where it will radiate clearly to the most objects. Point away from windows and other non-absorbing items. Turn the controller on high, remove chill from room, and turn down to desired comfort level.

SAFETY OF THE QUARTZ ENERGY SAVER:

Quartz Energy Savers have been extensively tested and approved for use by Underwriters Laboratory (UL). Portable models contain tip-over switches to automatically turn the unit off if knocked over, and a safety thermostat to regulate the room temperture.

WILL QUARTZ ENERGY SAVERS REDUCE HEATING COSTS?

Yes. Quartz Energy Savers are twice as efficient as conventional electric heat and users of fuel oil report extensive savings. Many customers that purchased an initial heater have purchased others to heat major portions of their home. Numerous customers now heat their entire home with QUARTZ ENERGY SAVERS. They are doing this because it is economical.

Quartz Energy Savers will save you money, we believe as high as 50% over existing home heating costs, however this is a direct function of your control over the rooms you heat, and how often you heat them. The Quartz Energy Saver permits you to decide when you want to heat a specific room. It is your zone control.

PRODUCT GUARANTEE:

The Quartz Energy Saver is under warranty for one year from date of purchase, except for breakage of the quartz elements. It is designed for long life, with elements tested for over 9,000 heating hours. The quartz elements are replaceable at a current replacement cost of $14.00 per tube. Each unit contains two quartz elements.

AD:

Eliminate your concerns over potential fuel shortages, the high cost of home heating oil, deregulation of fuel oil and natural gas, and use the QUARTZ ENERGY SAVER, powered by low cost, readily available electricity. The QUARTZ ENERGY SAVER is clean, quiet and the sensible solution to efficient, effective heating.

APPENDIX A-18

Quartz Heating, The Sensible Solution To Effective and Efficient Heating.

BASIC FACTS ON QUARTZ HEATING AND ANSWERS TO QUESTIONS REGARDING IT.

WHY CONSIDER QUARTZ HEATING?

Conventional sources of energy (oil, electric baseboard, natural gas and firewood) are expensive. QUARTZ HEATERS are designed to provide instant heat, negating the need to extensively pre-heat areas to achieve comfort, thereby saving money for the user. QUARTZ HEATERS permit the user to heat living space only when in use.

WHO DEVELOPED QUARTZ HEAT?

German scientists developed QUARTZ HEATERS ten years ago to combat Europe's high cost of energy, resulting in efficient and effective heating used extensively today.

WHAT IS THE BASIC PRINCIPLE OF QUARTZ HEATING?

QUARTZ is one of four (Diamonds, rubies, charcoal and quartz) known elements in the world that produces pure radiant heat

QUARTZ HEATERS utilize conventional electric resistance coils encased in quartz tubes to magnify and intensify heat, reflect it off a polished shield and radiate it to surrounding areas. This carefully designed combination of components produces instantaneous heat.

ARE QUARTZ HEATERS SAFE?

Yes. QUARTZ HEATERS have been extensively tested and approved for use by Underwriters Laboratories (UL).

HAS QUARTZ HEATING BEEN TESTED IN THE UNITED STATES?

QUARTZ HEATING has been used for residential and commercial purposes for four years in the United States with an extensive test market conducted in the Northeast during the winter of 1977-78. All users have been extremely satisfied with the results.

HOW DO QUARTZ HEATERS SAVE MONEY?

QUARTZ HEATERS provide instant heat within one minute of operation, rapidly raising room temperatures to the comfort level in 20 minutes, permitting users to reduce heating levels in unoccupied rooms until their planned use.

Each model QUARTZ HEATER contains a QUARTZ ENERGY SAVER CONTROLLER which cycles the flow of energy to the heating elements to reduce power consumption.

WHERE ARE QUARTZ HEATERS MOST EFFECTIVE?

In any living space Users initially purchase QUARTZ HEATERS to solve specific heating problems in cold rooms. After initial use, they discover that QUARTZ HEAT is an economical solution to heating the entire house.

QUARTZ HEAT, for example, eliminates condensation on bathroom mirrors while showering

HOW MANY QUARTZ HEATERS ARE REQUIRED TO EFFECTIVELY HEAT A HOUSE?

This requirement varies depending on the house, its room sizes, amount of heat loss, ceiling heights, room configuration, etc suggests 100 watts per 18 to 22 sq ft. for planning purposes

recommends purchasing one QUARTZ HEATER for use in your most frequently occupied room When the QUARTZ HEATER'S effectiveness is self proven then consider purchasing additional QUARTZ HEATERS for other areas. Keep in mind, each 1200 watt heater utilizes 10 AMPS of available capacity of a typical 15 or 20 AMP circuit.

IS SERVICE READILY AVAILABLE FOR QUARTZ HEATERS?

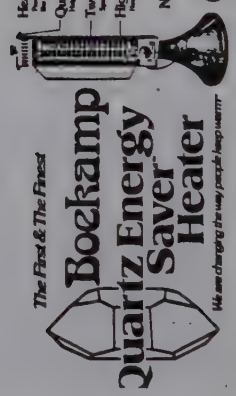
Yes. QUARTZ HEATERS are guaranteed for one year from date of purchase, but are specifically designed for a long lifespan. Replacement parts and service is available, if necessary fror

OTHER APPLICATIONS FOR QUARTZ HEATERS:

QUARTZ HEATERS are designed for effective use any place that people are cold. They should be considered for use in professional offices, restaurants, pleasure boats, mobile homes, garage workshops, laundry areas, patios, summer cottages and other areas.

23

Unique Energy Controller helps conserve energy and reduce heating bills


The First & The Finest
Boekamp
Quartz Energy Saver Heater
We are changing the way people heat warm
Heats People — Not Air
Quartz Guard™
Twin Quartz Elements
Highly Polished Reflector
One Year
No-Nonsense Warranty
LISTED

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Energy Policy and Conservation Act, as amended; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Boekamp, Inc. is a corporation organized existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 8221 Arjons Drive, in the City of San Diego, State of California.

Respondent Konrad Boekamp is an officer of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

345-554 O—82——21

ORDER

I

For the purposes of this Order, each of the terms listed below, as applied to the respondents named herein, is defined as follows:

1. A *competent and reliable scientific test* is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the professions to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization that conducts such tests as one of its principal functions, (b) by an agency or department of the state or federal government, or (c) persons employed or retained by respondents if they are qualified (as defined above in this paragraph) and can conduct and evaluate the test in an objective manner.

2. An *energy related claim* is any oral or written, general or specific, representation that, directly or by implication, describes or refers to the energy cost saving capability, energy saving capability, efficiency, conservation quality or insulating property of any product, or otherwise refers to the energy consumed or generated by any product.

II

It is ordered, That respondents, Boekamp, Inc., a corporation, its successors and assigns, and its officers, and Konrad Boekamp, individually and as an officer of the corporate respondent, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the electric resistance heater now known as the Quartz Energy Saver Heater ("Heater"), or any other product for which an energy related claim is made, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Representing orally or in writing, directly or by implication, including through the use of testimonials that:

(i) the Heater is more efficient or produces more heat than other electric resistance heaters of similar wattage;

(ii) the Heater provides "free" heat of any kind at any time;

(iii) the Heater is capable of heating objects which are far away from it in a short period of time;

(iv) the Heater evenly distributes heat throughout a typical room;

(v) the quartz tubes contained in the Heater are durable components;

(vi) the quartz tubes contained in the Heater intensify or magnify the heat generated by the electricity sent through the resistance coils enclosed in the tubes, or that the quartz tubes in any way increase the amount of heat generated by the Heater.

B. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, which relates to the heating capabilities, energy saving potential or other performance capabilities of the Heater or making any energy related claim for any other product unless: (1) such representation is true, and (2) at the time of making such representation, the representation is fully and completely substantiated in writing by competent and reliable scientific tests which remain available for inspection by the staff of the Federal Trade Commission for at least three (3) years following the final use of the representation.

C. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, respecting the energy consumption of or the cost of energy consumed by the Heater or any other covered product (as "covered product" is defined in Sections 321(a)(2) and 322 of the Energy Policy and Conservation Act, 42 U.S.C. 6291(a)(2) and 6292 or any amendments thereto) unless: (1) such substantiation includes tests conducted on the Heater or other covered product in accordance with test procedures prescribed by the Secretary of the Department of Energy pursuant to Section 323 of the Energy Policy and Conservation Act, 42 U.S.C. 6293 or any amendments thereto, with complete written documentation of such tests remaining available for inspection by the staff of the Federal Trade Commission for at least three years following the final use of the representation, and (2) such representation fairly discloses the results of such tests.

D. Misrepresenting orally or in writing, the purpose, content, or conclusion of any test or study pertaining to the Heater or any product for which an energy related claim is made.

E. Using the term "energy saver", or any other words or phrases of similar import or meaning, to name or designate the Heater.

F. Representing orally or in writing, directly or by implication, including through the use of testimonials, that use of the Heater or

any product for which an energy related claim is made will result in any energy savings or energy cost savings unless there is clear and conspicuous disclosure, in close conjunction with such representation, of all the circumstances and conditions that must be met if the purchaser is to experience similar savings.

G. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, in connection with the advertisement or promotion of the Heater or any product for which an energy related claim is made, which is inconsistent in any material respect with any representation concerning the Heater or other said product made, directly or by implication, in post-purchase materials supplied to the purchasers of the Heater or other said product.

H. Making any representation, orally or in writing, directly or by implication, including through the use of testimonials, regarding the durability or life span of the Heater, including representations regarding warranties or guarantees for the Heater, or regarding any life tests performed on the quartz tubes or resistance coils, without disclosing in close conjunction therewith, in print at least as large as the print in which the representation is made, or in an oral presentation, in speech as clear and distinct as that delivered in the rest of the presentation, that: (1) the quartz tubes contained in the Heater are fragile, unless the representation relates to a Heater in which the tubes are supported or protected in such a manner that they will not break when the Heater is tipped over; and (2) the quartz tubes contained in the Heater are not covered by the warranty or guarantee for the Heater, unless the quartz tubes are in fact covered by the warranty or guarantee.

I. Representing, orally or in writing, directly or by implication, including through the use of testimonials, that the Heater can heat or raise the temperature of a room, without disclosing in close conjunction therewith the following statement in print at least as large as the print in which the presentation is made, or in an oral presentation, in speech as clear and distinct as that delivered in the rest of the presentation, with nothing to the contrary or in mitigation of this statement:

HEATING OR RAISING THE TEMPERATURE OF A ROOM IS ONLY POSSIBLE AFTER EXTENDED, CONTINUOUS USE OF THE HEATER.

J. For purposes of this Part II of the Order, when representations are made in television advertising which give rise to a required disclosure, such disclosure must be made simultaneously in both

audio and visual without any distracting sounds and with a clear background.

III

It is further ordered, That respondents, within twenty (20) days from the date of service of this Order, send a copy of the letter as set forth in Exhibit A hereto via first class mail to each individual, partnership, corporation or other business entity to whom advertisements or promotional materials relating or referring to the Heater which contained a representation or testimonial prohibited by this Order or omitted a disclosure required by this Order were disseminated in the past and whom respondents are able to locate. Respondents shall use their best efforts to locate all such individuals, partnerships and corporations.

IV

It is further ordered, That respondents forthwith deliver a copy of this Order to: (1) all present and future employees, agents and representatives engaged in any way in the advertising, promotion, offering for sale, sale or distribution of the Heater or any other product for which an energy related claim is made; and (2) all present and future individuals, partnerships or corporations to whom the respondents sell or distribute the Heater or any other product for which an energy related claim is made, and which are engaged in the resale or distribution of the Heater or other said product; and that respondents secure a signed statement acknowledging receipt of the Order from each such person or entity referred to herein.

V

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten (10) years from the date of service of this Order the individual respondent shall promptly notify the Commission of his affiliation with a new business or employment whose activities include the manufacture, purchase, advertising, promotion, offering for sale, sale or distribution of any product for which an energy related claim is made, or of his affiliation with a new business or employment in which his duties and responsibilities involve the manufacture, purchase, advertising,

promotion, offering for sale, sale, or distribution of any product for which an energy related claim is made. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of all duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this Order.

VI

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order; *provided, however,* that in the event the giving of notice thirty (30) days prior to a proposed transfer, sale of assignment of all or a substantial part of the business or assets of the corporate respondent would prevent the consummation of such transfer, sale or assignment, respondents will be deemed to have complied with this Part VI of the Order if the respondents:

(a) give the Commission as much advance notice as possible regarding the proposed transfer, sale or assignment; and

(b) obtain a signed written agreement from the transferee, purchaser or assignee to be bound by the terms of this Order and file such agreement with the Commission prior to the consummation of the transfer, sale or assignment.

VII

A. *It is further ordered,* That respondents shall maintain all records that relate to any compliance obligations arising out of this Order for a period of not less than three (3) years and shall make such records available to the staff of the Commission.

B. *It is further ordered,* That respondents herein shall within sixty (60) days after service upon them of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

Date
8221 Arjons Drive
San Diego, California 92126
(714) 578-3710

RE: Recall of Advertisements and Promotional Materials

Dear Customer:

Some time ago we distributed to you advertisements and promotional materials concerning the Boekamp Quartz Energy Saver Heater. These materials contained a number of performance claims about the Quartz Heater. As a result of an investigation regarding these claims by the Federal Trade Commission, we have entered into the enclosed Consent Agreement and Order.

We have agreed to recall all past advertisements and promotional materials regarding the Heater which contain claims prohibited by the Order or which omit the disclosures required by the Order. To assure that no prohibited advertisements or promotional materials continue to be utilized, it is important that you return to us whatever advertisements and promotional materials you have received from us in the past.

Thank you for your attention.

Sincerely,

Konrad Boekamp, President
Boekamp, Inc.

In the Matter of

TELEDYNE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9131. Complaint, Nov. 27, 1979—Decision, April 13, 1981

This consent order requires, among other things, a Los Angeles, Calif. manufacturer of oral irrigating devices and other consumer products to cease misrepresenting the content, results or conclusions of any survey or opinion research; failing to base preventive or therapeutic claims about devices upon other than competent and reliable scientific tests or other evidence; and claiming that the American Dental Association recommends the Water Pik unless such claim is in fact authorized by the ADA. Further, the order requires that claims regarding the ability of a device to prevent, mitigate or treat periodontal disease be based upon clinical tests which are well-controlled using acceptable testing procedures and that the firm maintain records substantiating its claims for three years after disseminating advertisements affected by this order.

Appearances

For the Commission: *Randell C. Ogg, John Clewett, Roberta L. Gross* and *David Axelrad.*

For the respondent: *Peter K. Bleakley, Daniel M. Lewis, Maxwell J. Mehlman, Carol A. Cichowski,* and *Vicki J. Divoll, Arnold & Porter,* Washington, D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, as amended and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Teledyne, Inc., Teledyne Industries, Inc., and J. Walter Thompson Company, hereinafter sometimes referred to as Respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Teledyne, Inc., (Teledyne) is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware with its executive office and principal place of business located at 1901 Avenue of the Stars, Los Angeles, California.

Respondent Teledyne Industries, Inc. is a corporation, organized,

existing and doing business under and by virtue of the laws of the State of California with its executive office and principal place of business located at 1901 Avenue of the Stars, Los Angeles, California.

PAR. 2. Respondent J. Walter Thompson Company (Thompson) is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 420 Lexington Ave., New York, New York.

PAR. 3. Respondent Teledyne, through corporate devices under its control, to wit, Teledyne Industries, Inc. and its division Teledyne Water Pik, now, and for some time past has been engaged in the distribution, sale and advertising of oral irrigating devices and other consumer products to the public.

PAR. 4. Respondents Teledyne and Teledyne Industries, Inc. through Teledyne Water Pik, cause the said products when sold to be transported from their places of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Teledyne and Teledyne Industries, Inc. maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents Teledyne and Teledyne Industries, Inc., at all times mentioned herein have been and now are in competition in commerce with individuals, firms and corporations engaged in the sale and distribution of oral irrigators and other consumer products.

PAR. 6. Respondent Thompson is now, and for some time past has been, an advertising agency of the respondent Teledyne, Inc., and Teledyne Water Pik and now and for some time past has prepared and placed for dissemination, advertising material to promote the sale of various consumer products including the Water Pik oral irrigating device.

PAR. 7. Respondent Thompson, at all times mentioned herein, has been, and now is, in substantial competition in or affecting commerce with other advertising agencies.

PAR. 8. In the course and conduct of their businesses, and for the purpose of inducing the sale of Water Pik oral irrigators and other consumer products, respondents have disseminated and caused the dissemination of advertising in national magazines distributed by mail and across state lines, and in television and radio broadcasts transmitted by television and radio stations located in various States

of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

PAR. 9. Typical of the statements and representations in said advertisements, disseminated as previously described but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits A, B, C, and D.

PAR. 10. Through the use of said advertisements referred to in Paragraphs Eight and Nine, and other advertisements not specifically set forth herein, respondents have represented and now represent directly or by implication that:

1. four out of five dentists recommend Water Pik to their patients;
2. four out of five dentists recommend the Water Pik because, in their medical judgment, the Water Pik plays a significant role in the prevention of gum disease;
3. the Water Pik when used with other methods of dental care plays a significant incremental role in the prevention of gum disease;
4. the use of the Water Pik will significantly diminish the chances of getting gum disease.

PAR. 11. At the time of the first dissemination of the representations contained in Paragraph Ten, respondents did not possess and rely upon a reasonable basis for making these representations. Therefore, the making and dissemination of said representations as alleged, constituted and now constitute unfair or deceptive acts or practices.

PAR. 12. Through the use of said advertisements referred to in Paragraphs Eight and Nine and other advertisements not specifically set forth herein respondents have represented and now represent directly or by implication that they possessed and relied upon a reasonable basis for the representations set forth in Paragraph Ten at the time of their initial and each subsequent dissemination.

PAR. 13. In truth and in fact, respondents did not possess or rely upon a reasonable basis for those representations at the time of their initial and each subsequent dissemination. Therefore, said representations are and were deceptive or unfair.

PAR. 14. Through the use of the advertisements referred to in Paragraph Eight and Paragraph Nine and others substantially similar thereto Respondents have represented and now represent, directly or by implication, that an appropriately designed, conducted, and analyzed survey of dentists proves the representations in Paragraph Ten (1) and Ten (2).

PAR. 15. In truth and in fact, the aforementioned survey does not

prove the representation in Paragraph Ten for reason that the alleged survey of the recommendations of dentists was not designed, conducted, and analyzed in accordance with accepted survey standards. Therefore, the representation referred to in Paragraph Fourteen was and is deceptive or unfair.

PAR. 16. Through the use of the advertisements referred to in Paragraph Eight and attached hereto as Exhibit D and others not specifically set forth herein, respondents Teledyne and Teledyne Industries, Inc. have represented directly or by implication that the Water Pik oral irrigating device is approved by the American Dental Association.

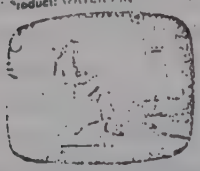
PAR. 17. In truth and in fact at the time of dissemination of such advertisements as referred to in Paragraph Eight, and attached hereto as Exhibit D, the Water Pik oral irrigating device was not approved by the American Dental Association. Therefore, said representation is false, misleading, deceptive and unfair.

PAR. 18. The use by the Respondents of the aforesaid false, misleading, deceptive or unfair statements and representations, has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of oral irrigators sold by respondent Teledyne by reason of said erroneous and mistaken belief.

PAR. 19. The aforesaid acts and practices of Respondents, as herein alleged, were and are, all to the prejudice and injury of the public and of Respondents' competitors, and constituted, and now constitute, unfair or deceptive acts or practices in commerce and unfair methods of competition, in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

Client: TELEDYNE WATER PIK
Product: WATER PIK

Title: "Presenter"
Length: :60 SECONDS

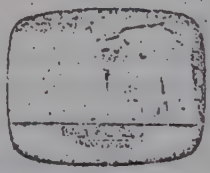


GREAT FULLER: Even though your teeth are healthy, you can still lose them.

In fact, one out of 10 adults in America lose all their teeth to gum disease...gum disease that could be prevented.

The regular use of the Water Pik Appliance can help. Because it does something easily that no other form of home dental care can

uses powerful jets of water to help remove the debris that can lead to gum disease.



It washes away the debris loosened by flossing...

and it clears away hard-to-reach food particles your toothbrush misses. And while

the Water Pik stimulates and massages your gums, it actually flushes away debris from beneath the gum line.

When the Water Pik is used as part of a complete program of dental hygiene it can help reduce the causes of gum disease. No wonder 4 out of 5 dentists surveyed recommend it.

Use the Water Pik. It works. Ask your dentist.

TELEDYNE
WATER PIK

EXHIBIT B

JWT

J. WALTER THOMPSON/SAN FRANCISCO
Creative Department

TELEVISION

No. TDSP 6693 TELEDYNE WATER PIK "Water Pik"	Title "Presenter" Length :30 Approval RG/ lh 3/17/76 AB PRODUCER
VIDEO	AUDIO
ROBERT FULLER - ON CAMERA IN DEN.	ROBERT FULLER: One out of 10 adults in America lose all their teeth to gum disease, but the Water Pik appliance can help.
CUT TO HIGH-SPEED FOOTAGE OF WATER JET IN NOTCH.	Its powerful jets of water help remove food debris that can lead to gum disease ... from under the gumline-- places a brush misses -- while it massages, stimulates gums.
CUT BACK TO FULLER.	Used as part of a complete oral hygiene program, the Water Pik can help reduce the causes of gum disease. No wonder 4 out of 5 dentists surveyed recommend the Water Pik.
PRODUCT SHOT	It works. Ask your dentist.

EXHIBIT C

JWT

J. WALTER THOMPSON/SAN FRANCISCO
Creative Department

1st Broadcast
CH 2 Modesto
SHOW: 11/30/77
AIR DATE: 11:30 P
TIME:

TELEVISION

Job No.	TDWP 7423	Title	"Robert Fuller"
Client	Toledyne Water Pik	Length	:30
Product	Water Pik	Approval	AS PRODUCED 7/14/77

VIDEO	AUDIO
OPEN ON ROBERT FULLER IN HIS DEN.	ROBERT FULLER: Have you tried the W. Pik yet? We literally get thousands letters from dentists who recommend Water Pik and we're going to show you why. . .Even after brushing, the Watc Pik removes food particles and even microscopic debris and bacteria you c
CUT TO CLOSE UP/SLOW MOTION OF TEETH.	
CUT TO SINK SHOWING DEBRIS.	see. . . Odor causing particles that also lead to gum disease. The sink t
CUT BACK TO FULLER IN BATHROOM.	shows why the Water Pik is one applia every family should have and one rear why 4 out of 5 dentists surveyed reco mend it.
PRODUCT SHOT WITH SUPER WATER PIK: IT WORKS.	The Water Pik. It works. Ask your dentist.

They used to call it pyorrhea. Now they call it periodontal disease. By either name it steals the teeth right out of your mouth. Perfectly good teeth become loose and fall out when the gums go bad. And three-fourths of all of the teeth people lose after the age of 40 are good teeth lost due to bum gums.

Now, there is a weapon with which we can fight back. It's now possible for your family to keep a full set of natural teeth for a lifetime. The weapon that's been added to the toothbrush and to regular dental attention, the newest weapon is a oral irrigating device - the Water Pik. Approved by the American Dental Association, the Water Pik is recommended by 4 out of 5 dentists.

Even if your teeth are bunched, even if you wear bridgework or braces, now you can clean them with a jet stream of water which also stimulates and firms your gums and takes less than 90 seconds. I Water Pik my teeth at bedtime. And get a Water Pik device for your family, for your whole family, from your drug department or discount store. And then over, around and in-between your Water Pik teeth will be hydraulically clean.

(3/30/76)

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(d) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Teledyne, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1901 Avenue of the Stars, in the City of Los Angeles, State of California.

2. Respondent Teledyne Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1901 Avenue of the Stars, in the City of Los Angeles, State of California.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondents, their successors and assigns, and their officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other entity, in connection with the consumer advertising, offering for sale, sale or distribution of any consumer product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the content, results or conclusions of any survey or opinion research.

B. Employing, in any advertisement for any product, the word "survey" (or any comparable term), or basing any claim upon one or more surveys in whole or in part which states, either expressly or by implication, the beliefs, opinions, practices, recommendations, or endorsements of any group, unless:

(1) a representative, unbiased and fair sampling from the population referred to in the advertisement is questioned;

(2) a projectable sample was used and the sample size of and the response rate to the survey were sufficiently large so as to allow meaningful projections to the population referred to in the advertisement with a reasonable degree of confidence, unless there is a clear and conspicuous disclosure in the advertisement that the survey may not be representative of the population referred to in the advertisement;

(3) the survey was completed within three (3) years prior to the date of the representation, unless there is other appropriate data which establish a reasonable basis for concluding that the beliefs, opinions, practices, recommendations or endorsements of the members of the group referred to in the advertisement have not materially changed since the completion of the survey; and

(4) the survey was designed, executed and analyzed in a competent and reliable manner.

C. Representing, directly or by implication, that the beliefs, opinions, practices, recommendations or endorsements of members of any group have been surveyed or sampled unless the survey or sample directly solicits the beliefs, opinions, practices, recommendations, or endoresments of the members of that group.

D. Representing, directly or by implication, that a professional body or any portion thereof has some belief, opinion, recommenda-

tion, endorsement or follows some typical course of conduct unless and only to the extent such representation is true.

Part II

It is further ordered, That respondents, their successors and assigns, and their officers, representatives, and agents and employees, directly or through any corporation, subsidiary, division or other method, in connection with the consumer advertising, offering for sale, sale or distribution to a consumer of a "device," as "device" is defined in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. (1) Making any statements or representations, directly or by implication, concerning the preventative or therapeutic abilities of such devices unless at the time the statements or representations are made, respondents possess and rely on a reasonable basis for such statements or representations, which shall consist of competent and reliable scientific tests as defined in Paragraph A(2) hereafter, or other competent and reliable evidence that substantiates such representation.

(2) For the purposes of this Order, a scientific test is one in which a person with skill and expertise in the field, conducts the test and evaluates its results in a disinterested manner using those testing procedures generally accepted in the profession which best ensure accurate and reliable results.

B. (1) Making any statements or representations, directly or by implication, concerning the ability of such devices to prevent, mitigate, or treat periodontal disease unless, at the time the statements or representations are made, respondents possess and rely on a reasonable basis for such statements or representations, which shall include a competent and reliable clinical test and may also include other competent and reliable evidence including competent and reliable opinions of experts who are qualified by professional training, education, and experience to render competent and reliable judgments in such matters.

(2) For purposes of this Order, a "clinical test" is one in which a person with skill and expertise in the field conducts a well-controlled test on human subjects, using those testing procedures generally accepted in the profession which ensure accurate and reliable results, and evaluates its results in a disinterested manner. The results of the test must be clinically significant, which requires that the test be, among other things, of sufficient duration to ensure that

the results are not materially distorted by any unusual short term practices or temporary physical conditions of the test subjects (as such practices or conditions related to the test conditions).

Part III

It is further ordered, That respondents, their successors and assigns, and their officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other entity in connection with the advertising, offering for sale, distribution or sale of the Water Pik oral irrigating device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that the Water Pik oral irrigation device is accepted, approved or endorsed by the American Dental Association unless (1) such claim is expressly authorized in writing, and unless (2) there is good reason to believe that at the time of such claims the American Dental Association subscribes to the facts or opinion therein contained.

Part IV

It is further ordered, That respondents, for the period of three years after respondents last disseminated the advertisements of the products covered by this Order, shall retain all test results, data, and other documents or information on which it relied for their advertisements or any documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in their possession during either their creation or dissemination. Such records may be inspected by the staff of the Commission upon reasonable notice.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondents such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the Order.

It is further ordered, That the respondents shall forthwith distribute a copy of this Order to each of their operating divisions, and to each of their officers, agents, representatives or employees who are engaged in the preparation and placement of advertisements.

It is further ordered, That the respondents shall, within sixty (60)

days after this Order becomes final and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by a responsible officer for respondents, setting forth in detail the manner and form in which they have complied with this Order.

Commissioner Pitofsky did not participate.

In the Matter of

J. WALTER THOMPSON COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9131. Complaint, Nov. 27, 1979—Decision, April 13, 1981*

This consent order requires, among other things, a New York City advertising agency to cease making survey claims unless the surveys are designed, executed and analyzed in a competent and reliable manner. Further, the firm is prohibited from making claims regarding the opinions or recommendations of any professional group unless that professional group is actually asked about their opinions or recommendations.

Appearances

For the Commission: *Randell C. Ogg, John Clewett, Roberta L. Gross* and *David Axelrad.*

For the respondent: *Donald H. Green, Mark Schattner* and *Mary Graham, Wald, Harkrader & Ross,* Washington, D.C.

Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and

* Complaint published at page 320 herein.

having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent, J. Walter Thompson Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 420 Lexington Ave., in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondent J. Walter Thompson Company ("JWT"), its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other entity, in connection with the advertising, offering for sale, sale or distribution of any "drug" or "device" (as those terms are defined by Section 15 of the Federal Trade Commission Act); aids to decrease use of cigarettes, cigars or pipes; smoke alarms; water purifiers; baby food preparation kits; shower head attachments; and water foot massagers (hereinafter referred to in Part I as "Product" or "Products"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Employing, in any advertisement for any product, the word "survey" (or any comparable term), or basing any claim upon one or more surveys in whole or in part which states, either expressly or by implication, the beliefs, opinions, practices, recommendations, or endorsements of any professional group (or portion thereof) with expertise relative to the product, unless:

(1) a projectable sample was used and the sample size of and response rate to the survey were sufficiently large so as to allow meaningful projections to the population referred to in the advertisement with a reasonable degree of confidence unless there is a clear and conspicuous disclosure in the advertisement that the survey may

not be representative of the population referred to in the advertisement;

(2) the survey was completed within three years prior to the date of the representation, unless there is other appropriate data which establishes a reasonable basis for concluding that the beliefs, opinions, practices, recommendations or endorsements of the members of the relevant professional population surveyed have not materially changed since the completion of the survey; and

(3) the survey was designed, executed and analyzed in a competent and reliable manner.

B. Representing, directly or by implication, that the beliefs, opinions, practices, recommendations or endorsements of members of any professional group with expertise relative to the advertised product have been surveyed or sampled unless the survey or sample directly solicits the beliefs, opinions, practices, recommendations, or endorsements of members of that group.

Provided, however, in circumstances where the survey or sample was conducted by an independent third party and was not, directly or indirectly, conducted or controlled by JWT or its client, it shall be an affirmative defense to an alleged violation of this Part for JWT to prove that it had a reasonable basis for believing that the survey or sample was conducted in accordance with the provisions of Part I of this Order. For purposes of this affirmative defense, JWT may demonstrate that it had a reasonable basis by showing (i) that the document reflecting the survey or sample had sufficient information for JWT to conclude that the survey(s) or sample(s) was conducted in accordance with this Part, or (ii) where there is insufficient information in such document that JWT made an appropriate inquiry and either (1) received a letter or memorandum from the third party containing adequate information regarding those aspect(s) of the sample(s) or survey(s) as to which there was insufficient information so that JWT had a reasonable basis for concluding that the sample(s) or survey(s) was conducted in accordance with this Part, or (2) sent a letter or memorandum to the third party confirming the third party's oral communication of adequate information regarding those aspect(s) of the sample(s) or survey(s) as to which there was insufficient information so that JWT had a reasonable basis for concluding that the sample(s) or survey(s) was conducted in accordance with this Part. In lieu of the letter or memorandum required by (1) or (2) above, JWT may rely on other written confirmation regarding the aspect(s) of the sample(s) or

survey(s) as to which there was insufficient information only if JWT has a reasonable explanation for so doing.

Part II

It is further ordered, That respondent J. Walter Thompson Company ("JWT"), its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other entity, in connection with the advertising, offering for sale, sale or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Making any statements or representations, directly or by implication, concerning the ability of the advertised product to prevent, mitigate, or treat periodontal disease unless, at the time the statements or representations are made, JWT possesses and relies on a reasonable basis for such statements or representations, which shall include a competent and reliable clinical test and may also include other competent and reliable evidence including competent and reliable opinions of experts who are qualified by professional training, education, and experience to render competent and reliable judgments in such matters.

For purposes of this Order, a "clinical test" is one in which a person with skill and expertise in the field conducts a well-controlled test on human subjects, using those testing procedures generally accepted in the profession which ensure accurate and reliable results, and evaluates its results in a disinterested manner. The clinical test must be of sufficient duration to ensure that the results (a) were not materially distorted by any unusual short-term practices or temporary physical conditions of the test subjects (as such practices or conditions related to the test conditions), and (b) were clinically significant.

Provided, however, in circumstances where the clinical test or other evidence was not directly or indirectly conducted or controlled by JWT, it shall be an affirmative defense to an alleged violation of this Part for JWT to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that it had a reasonable basis in accordance with Part II of this Order. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. Such opinion shall describe the contents of such test or other evidence upon which the opinion is based.

Provided further, however, in the event the Commission enters a

final order to cease and desist against Teledyne, Inc., or Teledyne Industries, Inc., or any division thereof, in this proceeding which prohibits the dissemination, without a reasonable basis, of claims for the prevention, mitigation or treatment of periodontal disease and if said order did not require that the reasonable basis for such claims include, as an essential and necessary element, a clinical test, the phrase in the second paragraph of Part II "and may also include" shall thereupon be deleted and the word "or" inserted in its place.

Part III

It is further ordered, That:

For the period of three years after JWT last placed the advertisements for dissemination, JWT shall retain all test results, data, and other documents on which it relied for advertisements of Products covered by this Order which were in its possession during either creation or placement by JWT of the advertisements.

JWT shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the Order.

JWT shall forthwith distribute a copy of this Order to each of its operating divisions, and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements of the Products covered by this Order.

JWT shall, within sixty (60) days after service upon it of this Order, and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form of its compliance with this Order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

NATIONAL TEA COMPANY, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9126. Decision, July 23, 1980—Modifying Order, April 15, 1981

This order reopens the proceeding and modifies the Commission order issued on July 23, 1980, 96 F.T.C. 42, (45 F.R. 53455), by modifying Paragraph IG of the Order to relieve respondent from the obligation of divesting a specific store, since no purchaser could be found.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 23, 1980

The Federal Trade Commission having considered respondent National Tea Company's petition filed on January 29, 1981 to reopen this matter and to modify the consent order to cease and desist issued by the Commission on July 23, 1980, and having determined that reopening and modification of the order is warranted:

It is ordered, That this matter be, and it hereby is reopened and that Paragraph I(G) of the Commission's order be and it is hereby modified to read as follows:

(G) The "disposition stores" means the following National ("N") stores and Applebaums' ("A") store:

1. N-80 (2326 Louisiana, St. Louis Park);
2. N-91 (3115 E. 38th St., Minneapolis);
3. N-99 (150 Apache Plaza, St. Anthony Village);
4. N-210 (4300 Xycon Ave., New Hope);
5. N-130 (1901 W. 80th St., Bloomington); and
6. A-8 (900 E. Maryland, St. Paul).

In the Matter of

AMERICAN GENERAL INSURANCE COMPANY, ET AL.

DISMISSAL ORDER AND OPINION IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8847. Complaint, June 17, 1971—Dismissal Order, April 21, 1981*

On remand from the Ninth Circuit Court of Appeals, 589 F.2d 462, the Commission has determined to dismiss the June 17, 1971 complaint which alleged that the effect of American General Insurance Co.'s 1969 acquisition of Fidelity & Deposit Co. of Maryland would be to decrease competition in the fidelity and surety bond markets. The Commission, in dismissing the complaint, held that it would not be in the public interest to impose an order, at this late date, on a respondent no longer doing business in the relevant market.

Final Order

This matter has been heard by the Commission on remand from the Court of Appeals upon the appeals of complaint counsel and respondent from the initial decision and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain respondent's appeal. Complaint counsel's appeal is denied. The motion to supplement the record filed by complaint counsel is granted. The motion to dismiss filed by respondent is granted. Accordingly,

It is ordered, That the complaint is dismissed.

Opinion of the Commission

By Pitofsky, *Commissioner*:

This case is before us on remand from the Ninth Circuit after an appeal of a cease and desist order issued by the Commission on June 28, 1977. For the reasons set forth in this opinion, the Commission has determined to dismiss the complaint.

The history of this proceeding is long and tortuous. The complaint was issued on June 17, 1971, challenging the July 1, 1969 acquisition by American General Insurance Company of Fidelity & Deposit Company of Maryland (F&D). Various interlocutory proceedings followed, including an unsuccessful district court action filed by respondent to enjoin the Commission from proceeding with the case. *American General Insurance Co.* v. *FTC,* 359 F. Supp. 887 (S.D. Tex.

* Complaint, Initial Decision, Opinion and Final Order previously published at 89 F.T.C. 557.

1973), *aff'd,* 496 F.2d 197 (5th Cir. 1974). The initial decision was issued in August of 1975, and respondent was ordered by the Administrative Law Judge to divest F&D.

Both sides appealed from the findings of the ALJ, and the Commission affirmed the initial decision in 1977. Because of the participation of Commissioner Collier in both the earlier interlocutory action (as General Counsel) and the Commission decision, the Ninth Circuit reversed and remanded the case to the Commission. *American General Insurance Co.* v. *FTC,* 589 F.2d 462 (9th Cir. 1979). After the remand, the Commission reopened the proceeding and invited briefs from the parties on how to proceed. We now have before us, in addition to the original briefs filed with the Commission in connection with the appeal from the initial decision, a supplemental appeal brief from complaint counsel, an opposition thereto, a motion to dismiss from respondent and complaint counsel's opposition to that motion.

The Commission's 1977 decision found American General's acquisition of F&D to be an unlawful horizontal acquisition that substantially lessened competition in the fidelity and surety bond markets. *American General Insurance Co.,* 89 F.T.C. 545 (1977). After the close of the record in the Commission proceeding, respondent significantly altered the nature of its presence in the relevant products markets. In 1976, respondent terminated most of its own bonding business, other than that conducted by F&D.[1] Subsequently, in 1979, American General ended the rest of its business in the bond markets, except for the bonds written by F&D.[2] Finally, in December of 1980, American General sold F&D to two Swiss companies, and thereby withdrew entirely from the relevant product markets.[3]

Respondent has now moved to dismiss the complaint on the ground that the case has become moot because divestiture of F&D, as ordered by the Commission in 1977, has been accomplished. Alternatively, respondent contends that it would not be in the public interest for the Commission to enter an order against it. Complaint counsel oppose dismissal of the case, arguing that it is not moot because they believe that further relief, beyond the divestiture of F&D, is warranted.

We agree with complaint counsel that the case is not moot. Under the case law cited by both parties, a case is not moot if a controversy

[1] Affidavit of H.J. Bremermann, Jr., May 2, 1980 at 1. This affidavit was entered into the record by order of October 6, 1980.

[2] *Id.* at 2.

[3] Affidavit of J.F. Flack, January 30, 1981. We hereby reopen the record and receive this affidavit into evidence.

remains to be resolved, even if the controversy involves only the question of appropriate relief.[4] Here, there obviously remains such a controversy. Further, as reiterated by the Supreme Court in the case relied upon by respondent, the mere voluntary cessation of illegal conduct (*i.e.* divestiture of an unlawfully acquired company) "does not deprive the tribunal of power to hear and determine the case . . . ."[5] Indeed, there may be a public interest in having the legality of the abandoned practices settled.[6] We do not believe that a company should be permitted to escape the imposition of a Commission cease and desist order, once it has reaped the fruits of an illegal acquisition, by selling off the acquired company.

We are much more sympathetic to respondent's argument that it is not in the public interest to enter an order against American General. Complaint counsel would have us impose further relief, arguing that such relief is necessary to restore the market to the competitive conditions prevailing before the acquisition of F&D. To this end, they argue that the Commission should impose a ten-year ban on acquisitions by respondent of any fidelity or surety underwriter without prior Commission approval (Supplemental Appeal Brief at 7). Such a ban was contained in the Commission's previous order, and they argue it is necessary because it is likely that American General will make future anticompetitive acquisitions.[7]

Complaint counsel's second request is more complicated. They have asked the Commission to require American General to divest to F&D the earnings and capital it took from it after the acquisition (Supplemental Appeal Brief at 8). According to complaint counsel, American General has taken approximately $41 million from F&D in the form of a special dividend from capital and surplus ($20 million), and quarterly dividends equal to F&D's earnings ($21 million). Complaint counsel assert that since a bond company needs liquid assets, it is necessary to return this money so that F&D can be an effective competitor. The same relief was requested by complaint counsel when this case was before the Commission in 1977, and it was denied.

We do not believe that it is in the public interest to enter an order against American General. We are not convinced that there is a reasonable likelihood that American General will reenter the

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[4] *United States* v. *Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968); *Walling* v. *Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944).

[5] *United States* v. *W.T. Grant Co.,* 345 U.S. 629, 632 (1953).

[6] *Id.* at 632.

[7] Complaint counsel have moved to supplement the record with an SEC filing submitted by American General, indicating its intention to purchase some shares of The St. Paul Companies, Inc., a competitor of American General in the relevant product markets. We hereby grant the motion to reopen the record, and receive the Schedule 13D into evidence.

relevant market, nor do we have reason to believe that if they do the reentry would be anticompetitive. With regard to the divestiture of the earnings, we do not believe that any relevant circumstances have changed since our first denial of the request for the earnings divestiture. Complaint counsel have not shown that F&D's competitive viability has been impaired because it lacks sufficient liquid assets.

Because we do not believe it is in the public interest to impose an order at this late date on a respondent no longer doing business in the relevant markets, respondent's motion to dismiss is granted.

In the Matter of

ALBERTSON'S, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3064. Complaint, April 21, 1981—Decision, April 21, 1981

This consent order requires, among other things, a Boise, Idaho operator of retail grocery stores to refrain from acquiring any unapproved retail grocery store business in specified areas for a period of ten years.

Appearances

For the Commission: *Rafe H. Cloe.*

For the respondent: *Michael F. Reuling,* in-house general counsel, *James O'M Tingle, Pillsbury, Madison & Sutro,* San Francisco, Calif., and *David J. McKean, McKean, MacIntyre, Wilson & Richardson,* Washington, D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Albertson's, Inc., a corporation subject to the jurisdiction of the Commission, has acquired the California Division of Fisher Foods, Inc., which acquisition violates Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows.

DEFINITION

1. For purposes of this complaint, *Retail grocery stores* are retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and nonedible grocery items. In addition, these stores

often sell smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits and fresh or frozen meats.

ALBERTSON'S, INC.

2. Respondent Albertson's Inc. (Albertson's) is a Delaware corporation with its principal office at 250 Parkcenter Boulevard, Boise, Idaho.

3. As of January 1978, Albertson's operated and continues to operate retail grocery stores throughout the West Coast, the Rocky Mountain states and in Florida, Alabama, Louisiana and Texas.

4. Albertson's total sales for its fiscal year ending January 28, 1978 were approximately $1,816,495,000. Albertson's ranks among the ten largest retail grocery chains in the United States.

5. In the first half of 1978, Albertson's operated a chain of approximately 32 retail grocery stores in Los Angeles County and Orange County, California.

6. At all times relevant herein, Albertson's has been engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12) and was a corporation whose business was in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

FISHER FOODS, INC.

7. Fisher Foods, Inc. (Fisher) is an Ohio corporation with its principal office at 5300 Richmond Road, Bedford Heights, Ohio.

8. In the first half of 1978, Fisher operated a chain of approximately 197 retail grocery stores located in Ohio, Illinois and California.

9. Fisher's total net sales for its fiscal year ending December 31, 1977 amounted to approximately $1,536,523,000.

10. In the first half of 1978, the California Division of Fisher operated a chain of approximately 46 retail grocery stores, of which approximately 40 stores were in Los Angeles County and Orange County, California. The Fisher stores in California were operated under the trade name "Fazio's."

11. At all times relevant herein, Fisher has been engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12) and was a corporation whose business was in or affecting commerce, as

"commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

ACQUISITION

12. On or about July 17, 1978, Albertson's acquired Fazio's following an agreement in principle reached between Albertson's and Fisher in April 1978.

TRADE AND COMMERCE

13. The relevant line of commerce in which to assess Albertson's acquisition of Fazio's is retail sales by retail grocery stores.

14. The relevant section of the country or geographic market is Los Angeles County and Orange County, California. (Los Angeles/Orange County).

15. The retail grocery store business in Los Angeles/Orange County is concentrated, with the combined market share of the four largest retail grocery chains estimated to be approximately 48.6% in 1978.

16. In the first half of 1978, Albertson's operated approximately 32 retail grocery stores in Los Angeles/Orange County. It ranked as the ninth largest firm in that market with a market share of approximately 3.6%.

17. In 1978, Fazio's operated approximately 40 retail grocery stores in Los Angeles/Orange County. It ranked as the seventh largest firm in that market with a market share of approximately 4.9%.

18. Albertson's and Fazio's have been for many years direct and substantial competitors of one another in the relevant line of commerce in Los Angeles/Orange County.

19. Immediately following Albertson's acquisition of Fazio's, Albertson's was the sixth largest operator of retail grocery stores in Los Angeles/Orange County.

EFFECT OF THE MERGER: VIOLATIONS CHARGED

20. The effect of the merger set forth in Paragraph 12 herein may be substantially to lessen competition or tend to create a monopoly in the relevant market, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the acquisition constitutes an unfair method of competition and an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) in the following ways among others:

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a) The elimination of actual competition between Albertson's and Fisher in the retail grocery business in Los Angeles/Orange County;

b) actual competition between competitors generally in the retail grocery store business in Los Angeles/Orange County may be lessened;

c) the elimination of Fisher as a substantial independent competitor in the retail grocery store business in Los Angeles/Orange County;

d) increased concentration in the retail grocery store business in Los Angeles/Orange County; and

e) the encouragement of further acquisitions and mergers by and among other leading firms in the retail grocery store business in Los Angeles/Orange County.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Albertson's, Inc. is a corporation organized, exist-

ing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 250 Parkcenter Boulevard, in the City of Boise, State of Idaho.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

As used in this order:

(A) *Albertson's* means Albertson's, Inc., a corporation organized under the laws of Delaware with its principal executive offices at 250 Parkcenter Boulevard, Boise, Idaho, and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(B) *Retail grocery stores* are retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and nonedible grocery items. In addition, these stores often sell smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits and fresh or frozen meats.

(C) *Acquisition, acquire, merger,* or *merge with* includes all other forms of arrangement by which Albertson's may obtain all or any part of the market share of any other retail grocery store or stores.

II

It is ordered, That for a period of ten (10) years from the date on which this order becomes final, Albertson's shall not merge with or acquire, or merge with or acquire and thereafter hold, directly or indirectly through subsidiaries or in any other manner, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of any individual, firm, partnership, corporation or other legal or business entity which directly or indirectly owns or operates any retail grocery store, where such acquisition or merger involves five or more such retail grocery stores, any one of which is located in any of the following areas:

(A) In Washington, Oregon, Nevada, Idaho, Montana, Wyoming,

New Mexico, Utah, Colorado, Florida, California, Texas, Louisiana, Alabama or Arizona; or

(B) Within five hundred (500) miles of any warehouse owned or operated by Albertson's at the time of such acquisition or merger and which is engaged in the shipment of products to retail grocery stores; or

(C) Within three hundred (300) miles of any retail grocery store owned or operated by Albertson's at the time of such acquisition or merger.

III

It is further ordered, That upon written request of the staff of the Federal Trade Commission, Albertson's shall submit such reports in writing to assure compliance with this order as may from time to time be requested.

IV

It is further ordered, That Albertson's notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate changes, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance with the obligations arising out of this order.

IN THE MATTER OF

THOMPSON MEDICAL COMPANY, INC., ET AL.

Docket 9149. Interlocutory Order, April 22, 1981

ORDER DENYING MOTION OF RESPONDENT THOMPSON MEDICAL COMPANY, INC. TO RECONSIDER COMPLAINT

The administrative law judge has certified to the Commission a motion filed by respondent Thompson Medical Company, Inc. to reconsider the complaint issued by the Commission in this proceeding.[1] In support of its motion, respondent argues that the Food and Drug Administration (FDA) has the responsibility to determine drug efficacy, and that the FDA-appointed panel on topical analgesics will review the evidence on the efficacy of Aspercreme's active ingredient ("TEA"). Respondent contends that it is consequently not in the public interest for the FTC to conduct the above-captioned proceeding. For the reasons stated below, the Commission disagrees.

The Commission has authority under Sections 5 and 12 of the FTC Act, 15 U.S.C. 45 and 52, to challenge, *inter alia,* advertising claims which it has reason to believe are false or deceptive. While the statutory authority of the FDA and FTC overlap to some degree, under the Liaison Agreement between the two agencies there is in fact no duplication of function because the Commission exercises primary jurisdiction over nonprescription drug advertising and the FDA exercises primary jurisdiction over drug labeling. 36 Fed. Reg. 18539 (1971), 3 Trade Reg. Rep. (CCH) ¶9851 at 17,678.[2] Thus, while any relevant findings to emerge from FDA's OTC drug review—concerning, *e.g.,* the performance of "TEA"—can of course be given appropriate consideration by the ALJ and the Commission if made part of the record of the present proceeding, the Commission's responsibility to police allegedly false or deceptive OTC drug advertising is in no way diminished during the pendency of the

[1] The motion is captioned "Motion to Reconsider Complaint." Elsewhere in its filing, respondent frames its motion as a request "that the Commission withdraw those portions of the complaint which challenges the efficacy of Aspercreme as a topical analgesic ***" (Motion at 2), and as a request that "the Commission amend its complaint *** to remove the allegations challenging the advertising claims regarding the efficacy, and mode of action of the product Aspercreme" (Motion at 5). This Order constitutes a denial of the requested relief in all its forms.

[2] Moreover, the Supreme Court has long held that the same issues and parties may be proceeded against simultaneously by more than one agency. See, *e.g., FTC* v. *Cement Institute,* 333 U.S. 683 (1948). See also *Warner-Lambert* v. *FTC,* 361 F. Supp. 948, 952 (D.D.C. 1973), in which the court applied this principle in disposing of precisely the same argument that respondent has presented here.

FDA's extensive process. See *Warner-Lambert Co.* v. *FTC,* 361 F. Supp. 948 (D.D.C. 1973).[3]

Respondent also argues that the Commission has unfairly "singled it out" and placed it at a disadvantage relative to other marketers of TEA-based products. As the complaint is based on advertising claims allegedly made by this respondent, however, it is appropriately focused solely on this respondent (along with the advertising agency respondent).[4] Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

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[3] See also, *e.g.*, Commission Response to Morton-Norwich's Motion to Quash Subpoena Duces Tecum, File No. 7923228 (May 14, 1980); Order of the Commission Denying Respondent American Home Products' Motion to Dismiss the Complaint or in the Alternative Suspend Proceeding, Docket No. 8918 (May 31, 1977).

[4] In any event, it is well settled that the Commission may exercise its discretion to proceed against one company without taking action against similarly situated competitors. *FTC* v. *Universal Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411 (1958).

IN THE MATTER OF

TEXORA INTERNATIONAL CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT OF 1939

Docket C-2794. Decision, Feb. 23, 1976—Modifying Order, April 22, 1981

This order reopens the proceeding and modifies the Commission order issued on Feb. 23, 1976 (41 F.R. 11817, 87 F.T.C. 273), by deleting the first "IT IS FURTHER ORDERED" paragraph which required respondents to file a special performance bond with the Secretary of the Treasury and replacing it with one requiring respondents to provide for fiber content testing and relabeling of misbranded wool products.

ORDER MODIFYING CEASE AND DESIST ORDER

In their request filed on January 23, 1981, and their amended request filed on February 12, 1981, the respondents petitioned the Commission, pursuant to Section 2.51 of its Rules of Practice, to reopen the proceedings and modify the order of February 23, 1976, entered in Docket No. C-2794. Respondents ask that the first *"It is further ordered"* paragraph be deleted from the order and that a new paragraph be inserted in the order in lieu of that paragraph. The paragraph requested to be deleted from the order reads as follows:

It is further ordered, That respondents Texora International Corp., a corporation, its successors and assigns, and its officers, and Max Kovner, individually and as an officer of Texora International Corp., and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

The paragraph which respondents requested be inserted in the order to replace the paragraph deleted, as amended by their amended petition and further revised by agreement with staff reflected in their letters dated March 17, 1981, and March 24, 1981, is as follows:

It is further ordered, That respondents Texora International Corp., a corporation, its successors and assigns, and its officers, and Max Kovner, individually and as an officer of Texora International Corp., and respondents' representatives, agents and employees, directly or

through any corporation, subsidiary, division, or other device, shall cause such fiber content tests to be performed on each style or quality of their imported wool products as may be necessary to determine the minimum percentage by weight of the total fiber weight of each fiber present in such style or quality. If said fiber content tests reveal that the percentage of any fiber in any style or quality is misstated by more than three percent (3%) on the labels attached or affixed to such style or quality, such style or quality shall be relabeled to set forth on said labels the lowest percentage revealed by such tests of (1) wool, (2) recycled wool, (3) each fiber other than wool if the percentage of such fiber is five percent (5%) or more of the total fiber weight and (4) the aggregate of all other fibers. If said fiber content tests reveal that the percentages of fibers in such style or quality are, for practical purposes, undeterminable, then such style or quality shall be relabeled in accordance with rules 28 or 29 of the rules and regulations promulgated under the Wool Products Labeling Act of 1939, as for example:

(i) made of miscellaneous fibers including acrylic, cotton and polyester, and with a minimum of 20% recycled wool, or

(ii) 20% recycled wool
20% acrylic
20% cotton
40% unknown reclaimed fibers

(1) The requirement that fiber content tests be performed on each style or quality of respondents' imported wool products shall not be applicable to any style or quality of wool products imported during any calendar year, the amount of which does not exceed one thousand (1,000) yards, and which is used solely for samples or swatches to promote the sale of such style or quality and is not sold or offered for sale.

(2) The fiber content tests required by this paragraph shall be performed by an independent fiber content testing laboratory approved for testing wool products by the Department of Defense, United States Government.

(3) As used herein, the terms "style"or "quality" shall mean wool products which are represented to have the same unit weight, fiber content and weave and are manufactured by the same foreign supplier.

(4) As used herein, the terms "imported" and "importation" shall mean entered for consumption when wool products enter the United States on a consumption entry and withdrawn for consumption when wool products enter the United States on a warehouse entry.

In support of their request, the respondents have advanced a number of considerations intended to show changed conditions of fact since the order was issued and to show that the public interest will best be served by granting their request. They stated that, soon after the order became final, they instituted a program of testing the fiber content of imported fabrics and relabeling those found by these tests to be misbranded. They have agreed to continue their program of fiber content testing and relabeling of misbranded wool products under the terms of a paragraph of the order that they requested the Commission to place in the order in lieu of the paragraph requiring the filing with the Secretary of the Treasury of a special performance bond. They stated further that the high costs of premiums charged by sureties on the bond have exceeded their profits. They cited as a competitive disadvantage the fact that many of their competitors are not subject to the bonding requirement and that bonds have not appeared in recent Commission orders and court judgments under the Wool Products Labeling Act of 1939.

Having considered the request, the Commission has concluded that the order should be modified to delete the bond paragraph and to insert in the order, in lieu thereof, a paragraph providing for fiber content testing and relabeling of misbranded wool products and that the modification will safeguard the public interest. Therefore,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the first *"It is ordered"* paragraph of the order to cease and desist of February 23, 1976, entered in Docket No. C–2794, be, and it hereby is, deleted and replaced by the paragraph requested by respondents as set forth above.

IN THE MATTER OF

THE PILLSBURY COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISION ACT

Docket C-3065. Complaint, April 28, 1981—Decision, April 28, 1981

This consent order requires, among other things, that a Minneapolis, Minnesota manufacturer of refrigerated bakery dough ("RBD") products and its major distributor, Kraft, Inc., cease from entering into or enforcing any agreement which bars either party from freely dealing with competitive firms. The order further requires that a prescribed amendment eliminating exclusive dealing requirements be incorporated into the companies' current distribution contract relating to RBD products.

Appearances

For the Commission: *James C. Egan, Jr.*, and *Debra Simmons.*

For the respondent: *Edward C. Stringer,* General Counsel, The Pillsbury Company, *John D. French, Faegre & Benson,* Minneapolis, Minn., *O. E. Swain,* Kraft, Inc., *C. Lee Cook, Jr., Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd.,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and in the exercise of authority vested in it by the Act, the Federal Trade Commission, having reason to believe that the above-named respondents have violated Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint charging as follows:

I. DEFINITION

PARAGRAPH 1. For the purpose of this complaint the following definition shall apply:

Refrigerated dough bakery products (*RDB*) means dough-based, unbaked, packaged food products that are chemically leavened. Such products require refrigeration during distribution and storage, and must be heated before consumption to fully activate the chemical leavening.

II. THE PILLSBURY COMPANY

PAR. 2. The Pillsbury Company ("Pillsbury") is a Delaware corporation with its general office located at 608 Second Ave. South, Minneapolis, Minnesota.

PAR. 3. Pillsbury is an international food company operating in three major segments of the food industry. The Restaurant Group prepares and sells food through Burger King, and limited menu and specialty restaurants. The Consumer Products Group manufactures and sells, among other things, a broad range of dry, refrigerated and frozen grocery products. The Agri-Products Group processes grain by milling it into flour for sale to commerical users or to the Consumer Products Group.

PAR. 4. In its fiscal year ending May 31, 1979, Pillsbury had total sales and revenues of $2.166 billion, net earnings after taxes of $83.5 million, and total assets of $1.805 billion. According to Fortune magazine, in 1978 Pillsbury was the 176th largest in sales and 172nd largest in assets among the nation's industrial corporations.

PAR. 5. The Refrigerated Foods Division of Pillsbury's Consumer Products Group, an unincorporated division of Pillsbury, manufactures and sells refrigerated dough bakery products under various brand names, including Pillsbury, Hungry Jack, 1869 Brand, and Big Country. Pillsbury entered the refrigerated dough bakery products business in 1951, when it acquired Ballard and Ballard Company of Louisville, Kentucky.

PAR. 6. Pillsbury is the nation's largest manufacturer of refrigerated dough bakery products, with over 55% of total industry sales in its fiscal year ended May 31, 1978.

PAR. 7. At all times relevant herein, Pillsbury sold and shipped refrigerated dough bakery products throughout the United States and was, and is now, engaged in commerce or affects commerce as "commerce" is defined in the amended Federal Trade Commission Act.

III. KRAFT, INC.

PAR. 8. Kraft, Inc. (hereinafter "Kraft") is a Delaware corporation with its principal office located at Kraft Court, Glenview, Illinois.

PAR. 9. Kraft is an international manufacturer and marketer of food products, and is one of the nation's largest manufacturers and distributors of refrigerated dairy products. Its Retail Foods Group manufactures and sells cheese and related products; vegetable oil-based products such as salad dressings, margarine, cooking oils and shortening; jellies and preserves; and other products. The Dairy

Group manufactures and sells fluid milk, cream and manufactured dairy products, including cottage cheese, yogurt and sour cream. Kraft manufactures and sells under various brand names, including Kraft cheese, Miracle Whip salad dressing, Sealtest milk and ice cream, Philadelphia brand cream cheese, and Breakstone yogurt. Kraft also manufactures and sells non-food items, including chemicals, paper containers, aluminum cookware and toys.

PAR. 10. In the year ended December 31, 1979, Kraft had total sales to unaffiliated customers of $6.433 billion; net income after taxes of $188.1 million, and total assets of $2.523 billion. According to Fortune magazine, in 1978 Kraft was the 39th largest in sales and 91st largest in assets among the nation's industrial corporations.

PAR. 11. In addition to products manufactured by it, Kraft also distributes Pillsbury's refrigerated dough bakery products. In 1979, Kraft's sales of Pillsbury's refrigerated dough bakery products totaled more than $200 million.

PAR. 12. At all times relevant herein, Kraft distributed and sold refrigerated dough bakery products throughout the United States and was, and is now, engaged in commerce as "commerce" is defined in the amended Federal Trade Commission Act.

IV. VIOLATION

PAR. 13. Since July 2, 1951, Pillsbury and Kraft have entered into a series of written agreements and amendments thereto by which Pillsbury has appointed Kraft its principal distributor, with certain limited exceptions, of refrigerated dough bakery products. The agreements between Kraft and Pillsbury allow Pillsbury to sell refrigerated dough bakery products to additional other distributors should Kraft manufacture or sell competitive refrigerated dough bakery products.

PAR. 14. Pursuant to these agreements, Kraft has purchased substantially all of Pillsbury's refrigerated dough bakery products since July 2, 1951. In Pillsbury's fiscal year ended May 31, 1978, more than 99% of Pillsbury's sales of refrigerated dough bakery products were to Kraft, representing approximately 10% of Pillsbury's total consolidated net sales to unaffiliated customers.

PAR. 15. Since 1953, when Kraft closed its own refrigerated dough bakery products manufacturing plant in California, Kraft has not sold or distributed in the United States refrigerated dough bakery products manufactured by any company other than Pillsbury.

PAR. 16. The purpose or effect of these agreements has been to create an exclusive agreement between Pillsbury and Kraft, whereby

Pillsbury, the largest manufacturer of refrigerated dough bakery products in the nation, sells substantially all of these products to Kraft; and Kraft, one of the nation's largest manufacturers and distributors of refrigerated dairy products, purchases these products only from, and distributes these products only for, Pillsbury.

PAR. 17. The purpose or effect of the aforesaid acts and practices has been, or may be, to substantially lessen, hinder, restrain or suppress competition in the sale, distribution and purchase of refrigerated dough bakery products in interstate commerce.

PAR. 18. The acts, practices and methods of competition alleged in Paragraphs Thirteen, Fourteen, Fifteen and Sixteen are unfair and constitute a violation of Section 5 of the Federal Trade Commission Act.

Acting Chairman Clanton voted in the negative.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Pillsbury Company is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Delaware, with its office and principal place of business located at 608 Second Ave. South, in the City of Minneapolis, State of Minnesota.

Respondent Kraft, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Kraft Court, in the City of Glenview, State of Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

I.

For the purpose of this Order, the following definition shall apply:

Refrigerated dough bakery products (*RDB products*) means dough-based, unbaked, packaged food products that are chemically leavened. Such products require refrigeration during distribution and storage, and must be heated before consumption to activate fully the chemical leavening.

II.

It is ordered, That respondents Kraft, Inc. ("Kraft"), a corporation, and The Pillsbury Company ("Pillsbury"), a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale, purchase or distribution of RDB products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended do forthwith cease and desist from hereafter entering into or enforcing any written or oral contract with one another for the sale or distribution of RDB products to the retail trade by which:

(a) Pillsbury shall appoint Kraft its sole and exclusive distributor of RDB products; or

(b) Kraft shall be restricted in any manner from distributing the RDB products of a manufacturer other than Pillsbury.

III.

It is further ordered, That concurrent with the issuance of this Order, Kraft and Pillsbury shall make effective the attached

amendment to their current distribution contract dated July 1, 1976, relating to RDB products. This amendment is to be considered part of the Order. The purpose of this amendment is to allow:

(a) Pillsbury, in its sole discretion, to sell or distribute RDB Products to the retail trade through any means in addition to Kraft. Pillsbury will give Kraft at least sixty days' prior written notice of its intention to begin selling or distributing its RDB Products to the retail trade through any means in addition to Kraft;

(b) Kraft, in its sole discretion, to sell or distribute to the retail trade RDB Products manufactured by a person or persons in addition to Pillsbury. Kraft will give Pillsbury at least sixty days' prior written notice of its intention to sell or distribute competitive products;

(c) Pillsbury, in its sole discretion and upon prior written notice of at least one year, to terminate Kraft as a distributor to the retail trade of RDB Products in any area of the United States or in the entire United States; and

(d) Kraft, in its sole discretion and upon prior written notice of at least one year, to cease selling to the retail trade RDB Products manufactured by Pillsbury in any area of the United States or in the entire United States.

Provided, however that nothing in this Order shall be construed as requiring Pillsbury to sell or distribute its RDB products to or through any company or person other than Kraft; and Pillsbury shall be free, if it deems it advisable in its sole discretion, to continue selling its RDB products only to Kraft and its other existing distributors; and *Provided further,* that nothing in this Order shall be construed as requiring Kraft to sell, distribute, or otherwise deal in the RDB products manufactured by someone other than Pillsbury; and *Provided further,* that Kraft shall be free, if it deems it advisable in its sole discretion, to continue selling only the RDB products of Pillsbury.

IV.

It is further ordered, That thirty days after date of issuance of this Order, Kraft and Pillsbury shall each file with the Commission a written report setting forth in detail the manner and form in which it has complied with the Order. During the term of this Order, Kraft and Pillsbury shall each file with the Commission a written report setting forth in detail any change in their contract, or in any

amendments thereof relating to the provisions of this Order sixty days prior to the effective date of such change.

V.

It is further ordered, That Kraft and Pillsbury shall notify the Commission at least thirty days prior to any fundamental change in either respondent corporation which may affect compliance obligations arising out of this Order.

VI.

It is further ordered, That this Order shall expire ten years from the date of issuance of this Order.

Acting Chairman Clanton voted in the negative.

AMENDMENT

THIS AMENDMENT, entered into this 21st day of May, 1981, by and between The Pillsbury Company, a Delaware corporation (hereinafter referred to as "Pillsbury"), and Kraft, Inc., a Delaware corporation (hereinafter referred to as "Kraft"), shall become effective upon issuance of the Final Order arising from the Federal Trade Commission's investigation, File No. 741-0024.

WITNESSETH

WHEREAS, Pillsbury and Kraft are parties to an Agreement dated July 1, 1976 (hereinafter referred to as "the Agreement"), whereunder Pillsbury has appointed Kraft its exclusive distributor (except for five other specified distributors) of certain Pillsbury refrigerated dough bakery products (all of which products are hereinafter collectively called "RDB Products") to the retail trade; and

WHEREAS, Pillsbury and Kraft have entered into a consent agreement with the Federal Trade Commission requiring that the above-cited Agreement be amended;

Accordingly, Pillsbury and Kraft do hereby amend the Agreement as follows:

1. (a) Notwithstanding any other provisions of the Agreement, Pillsbury, in its sole discretion, may in any geographic area (or in the entire United States) begin selling its RDB Products to the retail trade through any means in addition to Kraft. Pillsbury will give Kraft at least sixty (60) days' prior written notice of its intention to begin selling its RDB Products to the retail trade through any means in addition to Kraft.

(b) Notwithstanding any other provision of the Agreement, Kraft, in its sole discretion, may sell to the retail trade products competitive with the Pillsbury RDB Products in any geographic area (or in the entire United States). Kraft will give

Pillsbury at least sixty (60) days' prior written notice of its intention to sell competitive products.

(c) Notwithstanding any other provisions of the Agreement, upon at least one (1) year's prior written notice, Pillsbury, in its sole discretion, may in any geographic area (or in the entire United States) terminate Kraft as a distributor; and upon at least one (1) year's prior written notice, Kraft, in its sole discretion, may in any geographic area (or in the entire United States) cease selling the RDB Products of Pillsbury to the retail trade.

(d) In the event any notice referred to in subparagraph (a), (b), or (c) above refers to an area less than the entire United States, a separate notice shall be given with respect to each geographic area and shall identify the area to the degree practicable.

2. As used herein, the phrase "through any means in addition to Kraft" shall mean the use of one or more distributors or brokers, Pillsbury's own sales force, or any other means chosen by Pillsbury, in addition to Kraft. The term "competitive products" as used herein shall include products made by any existing or future manufacturer, including but not limited to Kraft. The term "geographic area" shall mean any definable part of the United States and may include parts not contiguous to one another.

3. In the event that any time after Pillsbury has commenced selling its RDB Products through means other than Kraft, Kraft remains a distributor of RDB Products in some geographic areas and the supply or availability of Pillsbury's RDB Products is insufficient to fill the orders of Kraft and the other means chosen by Pillsbury, Pillsbury shall reasonably and fairly allocate the supply of RDB Products among Kraft and such other means, taking into account all relevant circumstances, including historical purchases by the retailers being served by each of them.

4. In any geographic area in which RDB Products of Pillsbury are being sold by Kraft as well as through some other means (other than the distributors through which Pillsbury presently sells its RDB Products), Kraft shall not have the obligation set forth in paragraph 11 of the Agreement to assume all loss resulting from spoilage of products in that geographic area, and instead Pillsbury shall reimburse Kraft for all credits or discounts which Kraft must give its customers by reason of spoils or distress product in such area.

5. Paragraphs 6, 17, 18, 19, 20, and 25 of the Agreement dated July 1, 1976 (and the phrase "sole and exclusive" in paragraph 4 thereof) are hereby canceled and rescinded.

6. Paragraph 21 of the Agreement dated July 1, 1976, is hereby canceled and rescinded, excepting only that the definition of "best efforts" contained therein shall remain in full force and effect and be applicable only during such times as Kraft is the sole distributor of RDB Products.

7. All references in paragraphs 6, 17 and 25 of the Agreement to a consent order then contemplated to be entered into between Pillsbury, Kraft, and the FTC, and all provisions of the Agreement which are in any way dependent upon or arise from the operation of that consent order which was contemplated but never became effective, are hereby nullified and rescinded in their entirety.

8. All other provisions of the Agreement which are not modified hereby shall remain in full force and effect.

9. This Amendment shall become effective when the FTC has formally concluded the aforementioned investigation by issuing a Final Order.

345-554 O—82——24

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed by their respective officers thereunto duly authorized on the date first above written.

THE PILLSBURY COMPANY
By _____
KRAFT, INC.
By _____

IN THE MATTER OF

MONTGOMERY WARD & COMPANY, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE MAGNUSON-MOSS WARRANTY ACT

Docket 9117. Complaint, Sept. 14, 1978—Decision, April 29, 1981

This order requires, among other things, a Chicago, Illinois operator of retail stores and catalog houses to make the text of written warranties readily available to prospective buyers prior to sale, and to prominently display signs advising consumers of such availability. Further, for a period of three years respondents are required to conduct semiannual audits to ensure continuing compliance with the provisions of the order.

Appearances

For the Commission: *Benita A. Sakin, Carlton Lowe* and *Kenneth B. Drost.*

For the respondent: *Bonnie B. Wan, Spencer H. Heine* and *T. E. Grace,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act and Rule 702, 16 CFR 702 promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Montgomery Ward & Co., Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charge in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act Pub. Law No. 93-637, 15 U.S.C. 2301 (Supp. 1975) and in Rule 702, 16 CFR 702.1 promulgated thereunder shall apply to the terms used in this complaint.

PAR. 2. Respondent Montgomery Ward & Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at One Montgomery Ward Plaza, Chicago, Illinois.

PAR. 3. Respondent is now and has been in the operation of a chain of retail department stores and catalog houses throughout the

United States. Its volume of business has been and is substantial. In the operation of its retail department stores, respondent is now and has been distributing, advertising, offering for sale and selling among other items, major appliances, including but not limited to refrigerators, stoves, washer-dryers, dishwashers, stereos and televisions which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

PAR. 4. Respondent, in the course and conduct of its aforesaid business, now causes and has caused consumer products to be distributed in commerce.

PAR. 5. The Federal Trade Commission, pursuant to Title I, Section 109 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2309, has duly promulgated the Rule concerning the Pre-Sale Availability of Written Warranty Terms on December 31, 1975 [16]CFR 702 (1977)], effective January 1, 1977. A copy of the Rule is marked and attached as Appendix A,* and is incorporated in this Complaint by reference as if fully set forth verbatim.

COUNT I

Alleging violations of the Magnuson-Moss Warranty Act and the implementing Rule promulgated under that Act and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Five are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 6. In the ordinary course and conduct of its aforesaid business, respondent regularly offers and has offered written warranties on consumer products. Therefore, respondent is a warrantor of consumer products.

PAR. 7. In the further course and conduct of its business as warrantor of consumer products actually costing more than $15.00 respondent has failed to provide its retail stores with the warranty materials required by 16 CFR 702.3(b)(1) which are necessary for such stores to comply with the requirements for sellers of consumer products as set forth in 16 CFR 702.3(a).

PAR. 8. Respondent's failure to comply with the provisions of 16 CFR 702 constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), as amended.

* Not reproduced herein for reasons of economy.

COUNT II

Alleging violations of the Magnuson-Moss Warranty Act and the implementing Rule promulgated under that Act and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Five are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 9. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 10. On or after January 1, 1977, respondent, in the ordinary course of its aforesaid business as a seller of consumer products actually costing more than $15.00 and manufactured on or after January 1, 1977 has failed to make the terms of written warranties available to the consumer prior to sale through utilization of one or more of the methods required by 16 CFR 702.3(a)(1):

1. Clearly and conspicuously displaying the text of the written warranty in close conjunction with the product;
2. Maintaining a binder system readily available to the consumer along with conspicuous signs noting the location of binders where the binders themselves are not in plain view;
3. Displaying the warranty package in such a way that the text of the warranty is visible; and
4. Placing a sign with the warranty terms in close proximity to the product.

PAR. 11. Respondent's failure to comply with the provisions of 16 CFR 702 constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) as amended.

INITIAL DECISION BY THEODOR P. VON BRAND,

ADMINISTRATIVE LAW JUDGE

DECEMBER 19, 1979

PRELIMINARY STATEMENT

The complaint charges Montgomery Ward & Co. ("Wards") with

violating the Magnuson-Moss Warranty - Federal Trade Commission Improvements Act, 15 U.S.C. 2301 et seq. (1979), and 16 C.F.R. 702 (1979) promulgated under that Act. Count I of the complaint alleges that respondent failed to supply its retail stores with the warranty materials needed by its stores to comply with the requirements of 16 C.F.R. 702.3. Count II charges that Wards failed to make the terms of written warranties available to the consumer prior to sale through utilization of one or more of the methods required by 16 C.F.R. 702.3(a)(1) (The Pre-Sale Rule). Both counts of the complaint allege that the failure to comply with the regulations constituted a violation of the Magnuson-Moss Warranty Act and an unfair or deceptive practice under Section 5 of the Federal Trade Commission Act. [2]

No proof was offered in support of the charges in Count I of the complaint. That Count is dismissed.

The Pre-Sale rule, which was promulgated on December 31, 1975, became effective a year later on December 31, 1976 (16 C.F.R. 700.12 (1979)).

This matter is now before the undersigned for decision based on the allegations of the complaint, the answer, the evidence of record and the proposed findings of fact, conclusions and briefs filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record and the contentions of the parties, makes the following findings of fact and conclusions, and issues the orders set out herein.

Findings of Fact

I. RESPONDENT AND ITS BUSINESS

1. Montgomery Ward & Co., Incorporated ("Wards") is a corporation, incorporated under the laws of the State of Illinois with its principal office and principal place of business located at One Montgomery Ward Plaza, Chicago, Illinois (Ans., ¶ 2; RA 1-3).

2. Wards is now and has been engaged in the operation of a chain of retail department stores and catalog houses throughout the United States (Ans., ¶ 3).

3. In the course of its business, Wards now causes and has caused consumer products to be distributed in commerce (Ans., ¶ 4).

4. Wards sells products through approximately 650 retail outlets: 411-427 retail stores in 41 states and 230 limited line catalog-retail stores (RA 4 and 5; RX 326 at p. 1-18; RX 327 at pp. 1-21-1-22).

5. Retail stores are full-line department stores carrying an

assortment of hard and soft goods and certain leased departments which provide various personal services to customers. In addition to providing delivery, installation and repair services, most retail stores operate restaurants and automobile centers (TBA) which install automotive equipment, such as tires and accessories (RX 326 at p. 1–18, RX 327 at p. 1–21). [3]

6. The limited line catalog-retail stores contain catalogs and maintain in stock for sale at retail several lines of merchandise, principally paint, appliances, automotive accessories and tires (PAAT) (RX 326 at p. 1–19, RX 327 at pp. 1–22).[1]

7. During the year ending December 28, 1977, Wards employed in excess of 103,000 persons (RX 326 at p. 1–20). In the following year, ending December 27, 1978, it employed in excess of 107,700 employees (RX 327 at pp. 1–23). Temporary sales people are used, for example, at the Christmas season (Kerin 1178–79). Employees are sometimes transferred from store to store (Ochu 984–85; Pagliaro 1015–16; Cote 1099–1100; Sorenson 1130–31).

8. Wards' retail operations sell merchandise acquired from approximately 6,000 different sources (RX 326 at p. 1–18; RX 327 at p. 1–21).

9. Over 90 percent of the products sold by Wards, whether or not covered by a written warranty, are sold under respondent's private labels (RA 16).

10. On some private label merchandise, costing more than $15.00 and manufactured after January 1, 1977, Wards offers its own written warranties (RA 10). Wards also sells non-private label consumer products costing more than $15.00 and manufactured after January 1, 1977, which are warranted by companies other than Wards (RA 17).

II. CHARACTERISTICS OF WARDS' RETAIL STORES

11. Wards' retail stores range in size from 1,720 to 220,297 square feet of selling space and from one to four floors of selling areas (CX 45).

12. In the Bloomington store, Bloomington, Minn. which has two selling floors with 114,000 square feet of selling space (Pagliaro 1065), the time needed to walk from one end of the sales floor to another does not exceed two minutes (Pagliaro 1042–43, 1057).

13. The majority of the three and four-level stores are the smallest stores in terms of square footage of selling space (CX [4]45).

[1] Complaint counsel introduced no evidence concerning Pre-Sale availability in PAATS stores.

However, Wards' store at 140 S State Street, Chicago, Ill. is one of Wards' largest stores; it consists of four selling floors totaling 200,624 square feet of selling space (CX 45cc). Most Wards' full-line retail stores contain several entrances (CX 50–55).

14. More than 50 percent of Montgomery Ward Automotive Centers are located in separate buildings from the closest Montgomery Ward retail store (RA 31d).

15. The Customer Accommodation Center (CAC) in each store is an area where numerous customer services are handled and where consumers go for information and assistance (RA 34; Banis 322–23, 337; Hollon 502; Pagliaro 1027).

Departments and Merchandise in Wards' Stores

16. Most Wards' full-line retail stores contain 55 departments. These departments fall within four general categories of merchandise: "A" Lines - Soft Goods; "B" Lines - Home Furnishings; "C" Lines - Heavy Line Merchandise; "D" Lines - Major Appliances (RX 343). However, not every Wards' store contains each of these 55 departments. The location of particular departments within a Wards' retail store varies from store to store and there is no general pattern or practice which governs where a particular department is located in a store in relation to another particular department (CX 50–55; Pagliaro 1027–28).

17. The layout of merchandise within a department varies from store to store (Williamson 947–50; Sorenson, 1135–37; Pinelli Interview, pp. 5–11). The layouts change because of remodeling (Gelder 528, 538–39; Ochu 1002).

18. In Wards' stores, "major appliances" includes the entire "D" Lines departments, including sewing machines, vacuum cleaners, televisions, stereos, records, air conditioners, humidifiers, and dehumidifiers, as well as the major kitchen appliances (RX 343; Pagliaro 1033–34; Williamson 977).

19. The "D" Lines - Major Appliances - in Wards' stores are not physically located in one selling area. In multi-level stores, some departments within the "D" Lines are on different floors. In some stores, the four departments which comprise the major kitchen appliances are physically separated (Pagliaro 1033–34, 1040–41).

20. The mix of merchandise in Wards' stores does not remain constant; rather, the variety of consumer products (including those subject to the Pre-Sale Rule) constantly changes (RX 369a–r[16]; [5]RX 370a–z[5]; RX 371a–rrrr; RX 372a–wwww). Not all merchandise is carried at all times by every retail store (CX 47).

21. In the TV/Stereo and Major Appliance Departments virtually all products sold are covered by written warranties and cost more than $15.00 (Williamson 962–63; Ochu 1002–03; Cote 1106; Sorenson 1152).

22. In most departments in the retail stores, only a limited number of products sold are covered by written warranties and cost over $15.00. Several departments sell only one or two such warranted products (CX 1e–l; CX 1f[6]–w[6]).

23. The following lines of merchandise sold under Wards' private label carry identical warranties: all black and white television sets are covered by the same warranty (CX 1ww; RX 2; Cote 1107); all color television sets are covered by the same warranty (CX 1xx; RX 1; Cote 1107); all microwave ovens are covered by the same warranty (CX 1h[3]; RX 3); and all private label small kitchen appliances from toasters to coffeemakers to popcorn poppers are covered by one, all-inclusive warranty (CX 1p[5]; RX 347–56).

III. WARDS' BINDER AND SIGN PROGRAM

24. After publication of the Pre-Sale Availability Regulations (16 C.F.R. 702), Wards chose as its primary method of compliance, a binder and sign program which would be implemented by providing each retail outlet with a select number of binders and signs (CX 10; McWaters 219–20, 906, 919). The decision to adopt the binder system was made by a Vice President, Mr. Marchese, (McWaters 218–19). Implementation of the policy was the responsibility of Chet Eckman, Vice President-Retail Operating Manager (McWaters 219, 221; Eckman 228–30).

25. Beginning August 1976, Wards took steps to assure that the binders would contain not only all the Wards' private label warranties but also the warranties covering non-private label merchandise. To accomplish this, Wards conducted surveys of its 6,000 sources to obtain copies of their warranties for use in the binders (RX 331, 332).

26. In the late summer and early fall of 1976, at the same time that all Wards' warranties were being revised to comply with the new 701 Regulations, meetings were held with all the merchandise department managers to discuss the revision of Wards' own warranties and the continued efforts to obtain source warranties for the binders (CX 12, 19, 20). [6]

27. Prior to the effective date of the regulations, corporate officials corresponded with store managers and store advertising managers concerning the revision of Wards' warranties, emphasiz-

ing that care had to be taken at the local levels to assure compliance with the company's legal obligations (RX 335).

28. The warranty binder employed by Wards is a large, 3-ring, looseleaf, heavy plastic binder. It is bright blue with large, white block lettering "WARRANTIES" on the front and spine (CX 1). The binder is divided into three parts: the white pages contain the index, by department, of all the products in the binder; Montgomery Ward warranties for private label products are printed on pink pages; and warranties for non-private label merchandise are printed on yellow pages. The three binder sections are separated by heavy green dividers which identify the section for Montgomery Ward private label warranties and the section for source warranties (CX 1; RX 369, 370, 371, 372). The text of all warranties on private label and source merchandise is included in the binder (CX 1; Pagliaro 1022; McWaters, 908).

29. The size, construction, and content of each warranty sign distributed were uniform for all Wards' stores (CX 43h). These signs were quarter-sheet size, 11" x 14", with orange lettering on white background (CX 2; Pagliaro 1023; Sorenson 1132, Kerin 1173–74). The orange and white coloring for the warranty sign was a distinct color combination, not used for any other types of signs in Wards' retail stores (Cote 1113; Sorenson 1132–33).

30. These signs state the following:

MERCHANDISE WARRANTY INFORMATION

Warranties covering merchandise sold in this store are available for inspection at the Customer Accommodation Center and the Automotive Center.

Any salesperson will direct you to these or other convenient Warranty information locations (CX 2).

A. Implementation of Initial Binder and Sign Program at the Store Level

31. The first step in the actual implementation of the binder and sign program at the retail level was a letter from Mr. Eckman to all retail store managers in November 1976 and a [7]separate letter to each PAAT manager, also sent in November 1976. These letters stated that the Consumer Product Warranty Act (Magnuson-Moss Warranty Act) requires sellers to make written warranty terms available to consumers before the sale of warranted merchandise (CX 10; RX 333).

32. For retail stores, Mr. Eckman's instructions were that the warranty binders were to be placed in the Customer Accommodation Center; the Automotive Center; and for stores with multi-levels, the

store manager was to select a central location, by floor, for placement of another warranty binder. Mr. Eckman also stated that warranty signs were being made and distributed from Chicago. A sign was to be placed in conjunction with each binder and additional signs displayed in prominent areas as follows: A) Appliance Department; B) A main entrance/exit to the store; and C) Near the area of escalators/elevators (CX 10).

33. Three binders were, in fact, sent to each retail store (CX 43b; RX 340; Eckman 242; Pagliaro 1022, 1030). The initial distribution of three warranty binders was made on November 16–19, 1976 (CX 43b). Depending upon store size, varying numbers of warranty signs were distributed to each retail store on November 22, 1976 (CX 43h).

34. Under a separate directive, each PAAT store was sent one warranty binder for display. In PAAT stores, warranty signs were to be displayed with the warranty binder and in the appliance department and the automotive area (RX 333, 340).

1. *Distribution and Placement of Binders*

35. In each of Wards' stores, there are approximately thirty-five departments carrying products for which warranty information is included in respondent's binder (CX 1c). Binders were not provided by respondent for each department in its stores which carried warranted goods (RA 20).

36. Pursuant to the binder part of the program, for each retail store, there was one binder per floor as follows:

a. In the Customer Accommodation Center leaving to the store manager's discretion the location within the CAC (CX 10; Eckman 326);

b. In the Automotive Center (TBA), which is more often than not, in a detached building (CX 10; Finding 14). [8]

c. In a third location, if needed because a multi-level store had a detached TBA. The choice of a third location on the remaining floor which did not have a binder as a result of a. and b. above was left to the discretion of each store manager (Pagliaro 1025). Store managers were given such discretion because no two stores are physically the same in size and layout (Finding 16).

37. Respondent's instruction dated November 19, 1976 to its store managers regarding the placement of binders and signs did not require that such binders be placed in either the Major Appliance Department or the TV/Stereo Department (CX 10a-b). Both of these

departments carry products which come within the scope of the Pre-Sale Rule (Finding 21).

38. In the period September 1, 1977 to February 1, 1978, a customer in some Wards' stores, in order to review a warranty binder, was required to go either to the Customer Accommodation Center or the Automotive Center (RA 21).

2. *Distribution and Placement of Signs*

39. Pursuant to the signing part of the program, store managers were, on November 19, 1976, instructed to display one sign (CX 2) with each binder. Additional warranty signs were to be displayed in "prominent areas" as follows:

a. Appliance Department;
b. Main entrance; and
c. Escalator/elevator area (CX 10).

40. The initial shipment of signs was sent to each of Wards' retail stores on November 22, 1976 (CX 42e, 43h). Wards sent no fewer than two and no more than eight signs to each of its retail stores on that date (CX 42e, 43h). The number of signs sent to each store was based on the size of the store as determined by the store's square footage of selling space. The number of signs sent per store was as follows:

13,000	square feet	2
27,850	"	2
40,900	"	4
72,000	"	6
87,500	"	6
103,000	"	8 [9]
124,000	"	8
140,000	"	8
165,000	"	8

(CX 42e, 43h, 43o)

41. Wards' policy of requiring one sign with each of the three binders left some stores, on the basis of the initial shipment, with no signs for placement anywhere else in the store and other stores with at most five additional signs for placement at other points in the store. The number of signs from the initial shipment available for display other than with binders is as follows:

Number of stores	Number of signs available for placement in the store other than with the binder
82	0
55	1
148	3
138	5

(CX 10, 43e, 43h, 43o)[2]

42. In the period September 1, 1977 to February 1, 1978, respondent did not automatically supply its retail stores with enough warranty information signs for placement of such a sign in each of its departments where warranted consumer products were sold (RA 51).

43. Between September 1, 1977 and February 1, 1978, it was not the policy of Montgomery Ward to post signs indicating the location of warranty binders in each retail department of each of its retail stores where warranted consumer products were sold (RA 53).[3] **[10]**

44. Prior to February 1, 1978, an additional 1,100 signs identical to CX 2 were distributed to retail stores on a "by request" basis. No records exist identifying those of respondent's four hundred plus retail stores which requested such signs (CX 42e, 43i).[4]

3. *Presentation of the Binder and Sign Program to Wards' Personnel*

45. Meetings were held by the store manager during which the binder system was discussed. For example, one store manager held one meeting with department managers and followed up with a second meeting of all store personnel (Pagliaro 1024). In other instances, the store manager held meetings with the department managers and store staff and left it up to the department managers to inform their sales personnel (Williamson 944–45; Ochu 989, 998;

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[2] Respondent instructed its retail stores to place warranty signs with each binder as well as in the appliance department, a main entrance/exit and the escalator/elevator, if applicable (CX 10).

[3] In this connection, respondent's admissions explained that:

[B]etween September 1, 1977 and February 1, 1978, Montgomery Ward's retail stores were not directed to place signs indicating location of warranty binders in each retail department of each of its retail stores where warranted consumer products were sold. However, since individual stores could and, in fact, some did request and/or print their own additional signs, Respondent is unable to state whether, in a particular retail store, such signs were placed in each retail department in which warranted consumer products were sold (RA 52).

[4] After notification on February 2, 1978, by the Federal Trade Commission that Wards was not in compliance with the Pre-Sale Rule, signs identical to those in the initial distribution (CX 2) were sent to the retail stores in the same pre-determined quantity as the November 22, 1976, distribution; additional unrecorded distributions were made by request between February 14, 1978, and February 26, 1979 (CX 43i-j).

Cote 1100–1101; Sorenson 1132–34). In at least one instance, the meeting with the department managers was a special meeting called solely to discuss implementation of the binder system (Williamson 944–45). In other instances, it was discussed at a regularly scheduled weekly meeting (Pagliaro 1024; Sorenson 1147). Department managers related the details of the program to their staffs either at meetings (Williamson 950–55; Ochu 989; Sorenson 1133–34), or spoke to their sales personnel individually (Cote 1105–06). [11]

B. Supplementary Efforts Regarding the Initial Binder and Sign Program

46. Following the initial distribution of warranty binders in November 1976, additional binders (CX 1) were distributed to Wards' retail stores on a "per request" basis. Most of these shipments were not documented (CX 43b, g). However, in the fourteen months following the initial distribution of signs in November 1976, an additional 1100 signs (CX 2) were distributed to Wards' retail stores on this basis (CX 43i).

47. While it was not the policy of Wards to require its retail stores to fabricate additional signs, certain stores did fabricate additional signs. Store managers were afforded latitude to implement the program and to tailor the program to the needs of a particular store (CX 43k; Williamson 964). A random survey of Wards' stores selected by complaint counsel, showed some stores fabricated as many as 25, 15, 12, and 10 additional signs. A total of 36.4 percent of the surveyed stores fabricated some quantity of signs for use in addition to the corporate-mandated signing (the survey specifically excluded signs fabricated as replacements for corporate signs) (CX 431-n).

48. In 1977, one year after the binder and sign program was initially implemented, Wards' Merchandise Development Manager arranged and conducted a series of meetings in connection with that program (CX 19; RX 336–38). Three meetings were held in Chicago on April 20, 1977 (RX 337), and were attended by Mr. McWaters, Mr. Frank Berman, and by various persons in the merchandise departments, (McWaters 925). A make-up meeting was held on April 27, 1977, for those Chicago department managers who could not attend on April 20th. An additional meeting was held in New York on April 29th for the New York Office (RX 338). Those attending the meetings were provided with materials regarding continuing compliance with the 702 Regulations and copies of new warranty request forms (RX 338). At this series of meetings, McWaters explained the 702

Regulations and other applicable Federal Trade Commission requirements (CX 20e, f, h, j, k, n).

49. Since its inception in November 1976, Wards' binder system has been updated regularly. In its first year alone, four sets of warranty updates were distributed for inclusion in each binder (RX 369, 370, 371, 372).

50. The written instructions regarding the proper display for warranty binders and signs were repeated with each set of updates (RX 369, 370, 371, 372). [12]

51. By late 1977 or early 1978, Wards had learned that there were allegations that it was not in compliance with the 702 Regulations (CX 26; Terry 795–97).

C. Expansion of the Binder And Sign Program

52. During May and June of 1978, the binder and sign program was expanded. Brown and white plastic signs (RX 346) were sent to each retail store to be permanently affixed to cash registers/terminals in the B, C, and D Lines. These signs stated that merchandise warranty texts were available at the CAC and Automotive Service and that access to warranty information could be obtained by asking any salesperson (CX 29; RX 346). The plastic signs were received and glued to the top of the cash registers (Williamson 959–60; Ochu 996; Pagliaro 1053–54; Cote 1112–13; Sorenson 1139–40).[5]

53. Two silver and black warranty binder stands (RX 380) were sent to each store to be placed on the CAC and TBA counters (CX 28).

IV. WARDS' AUDIT PROCEDURES

A. General Corporate Audit Procedures

54. Wards' corporate audits are "exception" audits. This means that auditors are provided with the instructions to conduct an audit; the procedures are employed and the designated items reviewed; and then a written report is required only on those items on which exceptions or deficiencies are found. If an audit makes no mention of a particular aspect under review, the report is construed as meaning that the auditor found no violation (Terry 790–91).

55. Wards' Assistant Vice President, William Terry, is the "general auditor" of the company; he is primarily responsible for all the corporate auditing done within the company. Directly reporting

[5] Although some stores had more than 25 cash registers in the B, C, and D lines, only 25 signs to be affixed to cash registers were initially sent to each store (CX 30).

to Mr. Terry are nine managers, four of whom are Field Audit Managers. Each of the Field Audit Managers is responsible for the field audits within his region. These [13]regions are the combined Northeast and Southeast, North Central, South Central, and Western. Three out of four of these Field Audit Managers have assistants (Terry 788–89).

56. Reporting to the Field Audit Managers and their assistants in each region are the field auditors, classified as senior auditors, internal auditors, and auditors (Terry 789–90). Approximately 38–40 field auditors actually conduct the store audits. Wards also employs certain special auditors: administrative auditors, construction auditors, factory auditors, and EDP auditors (Terry 802–04).

57. Corporate audits of Wards' stores are generally done on a two or three-year cycle (Terry 791). Those stores which are better than average in terms of sales, profit, operations, inventory recovery and which have an assigned store controller would be on the longer audit cycle (Terry 791–92, 852).

58. The Field Audit Manager initiates the audit for any particular store and determines when one shall take place. He considers travel, personnel available, and whether someone in the corporate office may have requested acceleration of an audit in determining when a particular store is to be audited (Terry 799–800).

59. In addition to the regular corporate audits, there are follow-up retail store audits and special retail store audits. A follow-up audit may be performed six to nine months after a regular audit which revealed conditions which were generally bad in a store. A special audit is called when specific information requires it such as when an individual's integrity is at stake (Terry 801).

60. The corporate auditors who audit Wards' retail stores utilize a manual. The manual contains about 15 different sections including cash, sales records, credit service, accounts payable, merchandising, etc. (Terry 804–05). Each section describes the detailed audit program.

61. The audit manual does not list every possible item which may be audited. The auditing staff reviews new procedures and policies to determine if a particular item should be made part of the audit program. If so, an audit letter is issued to the Field Audit Managers who in turn issue an "auditor letter" (Terry 797–98). The instructions for audit procedures consist of the audit manuals plus the "auditors letters". Periodically—every three or four years—the manual is revised to incorporate the procedures contained in the "auditor letters" (Terry 798–99).

62. There is a procedure to ensure that the directives in the

manual and the auditor letters are followed. Field Audit [14] Managers review every audit submitted and contact auditors, if they believe a particular procedure is not being covered. On larger audits, they visit auditors in the field, review their work before it is submitted, and attend the closing meetings with management. At times, they supervise auditors in the conduct of the audit. If a Field Audit Manager observed that no notation was made for a particular procedure over a period of time, he would review the auditors' records to ensure compliance with proper procedures (Terry 807–09).

63. When a store is to undergo a corporate audit, the auditor shows up at the store. The store manager has no prior knowledge of the audit. Only a store controller, who is responsible for working with the auditor, may get advance notice of the audit, but the store controller is forbidden to notify the store manager (Terry 885; Pagliaro 1059). An audit may last anywhere from five to seven weeks. Among store personnel, only the store controller will accompany the auditor during parts of the audit (Pagliaro 1059). The auditor in the course of an audit performs many functions including counting cash, examining bank deposits, checking fitting rooms, and checking for binders and signs. The auditors physically go to the areas they are checking (Terry 882–83).

64. Upon the conclusion of a store audit, there is an audit review meeting. Present is a representative from the regional audit department, the district manager, the corporate field auditor, and the store management staff (Kerin 1218–19). Within a couple of weeks of the audit, the store manager must submit a written response to the audit explaining what was done or is to be done to correct each reported deficiency. This written response is sent to the Regional Vice-President, the District Manager, Mr. Terry, the Regional Controller, and the Regional Field Audit Manager, among others (RX 341; Pagliaro 1060–61; Kerin 1236).

65. A good corporate audit is important to store management and deficiencies are a serious matter which ultimately affect a store manager's evaluation (Pagliaro 1061; Kerin 1218–19, 1232a–33).

B. Specific Warranty Binder and Sign Program Auditing

66. In November of 1976, after receiving copies of Mr. Eckman's correspondence implementing the Wards' binder and sign program, Mr. Terry determined to add compliance with that program to the audit procedures. He issued a bulletin (CX 11) to the four Field Audit Managers, attaching the correspondence detailing the binder system (CX 10, 88, 89). The bulletin [15]directed that effective with audits commencing January 1, 1977, for retail and PAAT stores, auditors

must determine that warranty binders were displayed and signs posted as required by corporate instructions (CX 11; Terry 792–94).

67. After the audit procedure with respect to the binder and sign program was implemented on January 1, 1977, Wards' corporate auditors throughout the country reviewed stores for proper placement and display of warranty binders and signs. No exceptions on this point were shown for 93 percent of the retail stores audits (RX 20–325). CX 57–78 are audit reports noting deficiencies in compliance with Wards' binder and sign program.

68. When deficiencies were found, corrective action was taken to bring the deficient stores into compliance with the binder and sign program (RX 341–42; Kerin 1234–36). The audit procedure reinforced the store managers' awareness of the requirements of the binder and sign program (Kerin 1232a–1234).

69. After learning in late 1977 or 1978 of allegations that Wards was not complying with the Pre-Sale Rule, William Terry, Vice President Auditing, determined that the warranty binder and sign program should be added to the specific checklist which auditors must complete. From this checklist a statistical report is generated which permits the corporate offices to evaluate the overall level of compliance with this program by Regional and by Corporate totals (Terry 795–97, 810–12, 832–33, 836, 847).[6]

Retail Store Controllers

70. More than 200 retail stores have store controllers; namely, those stores with sales volume in excess of $10 million and certain stores with sales volumes between $6–10 million (Terry 852). Store controllers' responsibilities include accounting, invoicing records, inventory recovery, and store audits (Terry 848). [16]

71. Store controllers are physically located in retail stores and they perform certain functions for the store managers, but their main reporting relationship is to the Regional Controller and Regional Retail Controller (Terry 850; Pagliaro 1018).

72. Store controllers perform two complete store audits per year - one in the fall and one in the spring. They basically perform one audit section per week over a period of 13 to 15 weeks, stop the audit procedures for a period of time, and then conduct another 13 to 15 week cycle. Each 13 to 15 week cycle constitutes a full store audit

[6] When an item is added to such a checklist, the field auditors must specifically report that they reviewed the item and state that they found or did not find compliance (Terry 811–13). The effect of this checklist is to turn a particular audit item from a purely "exception" nature to a required check-off on a list. This checklist is not the same as a "positive action comment" which requires for a particular subject that a written comment actually be included in every audit report (Terry 822–23, 842).

(Terry 848–49; Pagliaro 1018–19). The only exception to two complete audit cycles per year by store controllers is when the store controller's audit cycle is interrupted by a corporate audit. The store controller's cycle stops during a corporate audit and does not begin again until the start of the next scheduled cycle (Terry 862).

V. THE FTC SURVEY OF RESPONDENT'S STORES

73. In the latter part of 1977, a number of the Commission's Regional Offices conducted surveys of respondent's stores to determine compliance with the Pre-Sale Rule (Findings 74–92).

The survey's primary focus was on the Major Appliance Department and the TV/Stereo Department in each store, because these were big ticket items and the Commission's staff felt it was important for consumers to be able to examine the warranty in the case of those products (Hollon 482).

A. The Individual Stores

74. *Serramonte Shopping Center California*

The Serramonte store, located within a mall, is a two story building consisting of one selling floor and one floor of administrative offices (Austin 274–75). There are approximately 10 consumer entrances to the store (Austin 302–03). The store was surveyed in November 1977 by consumer protection specialist, Fred C. Austin (Austin 269–70).

No warranty signs were posted nor binders displayed in the Major Appliance Department of the Serramonte store (Austin 275–76, 277, 309). The Major Appliance Department contained 20–50 [17]appliances (Austin 291); no warranty information was visible on the exterior of any appliance (Austin 276–77, 306). An examination of the interior of six appliances revealed written warranty information in one refrigerator and one freezer (Austin 291, 293, 305–06). In addition, the other four models contained sealed informational packets (Austin 294). No warranty information was visible on the exterior of the packet. Warranty information may have been contained in the interior of the sealed packets, but they were not opened for examination (Austin 310–13).

At the time of the survey, there were no signs at the cash registers directing consumers to warranty information. Signs containing information on the availability of written warranties were placed at cash registers at a later date (Austin, 284, 303–04).

An examination of the administrative floor, which included the CAC, revealed no signs and no binders (Austin 285–87).

75. *State Street, Chicago, Illinois*

The State Street store in Chicago is a free-standing store (Hollon 503). On November 15, 1977, this store was surveyed by Commission investigator Jennifer Hollon (Hollon 502).

There were no signs advising of the availability of warranty information at the entrance or en route to the Major Appliance and TV/Stereo Departments (Hollon 503, 505, 508).

The Major Appliance Department had no signs, no binders, and no warranty information on the exterior of the products (Hollon 503–04). When saleswoman Ms. Kellerman was asked for a copy of the warranty on a stove she produced a copy from a desk in the department (Hollon 504–05, 607). Ms. Kellerman did not mention the availability of warranty binders (Hollon 507, 607).

The TV/Stereo Department was devoid of warranty information on the products or in the form of signs or binders (Hollon 505). An inquiry as to the warranty covering a stereo produced an oral summation of the terms. When the same salesman was asked for a copy of the warranty he responded that "you get it when you buy the stereo" (Hollon 506).

The CAC was not surveyed. [18]

76. *Evergreen Park, Illinois*

The Montgomery Ward store in Evergreen Park is a four story mall store (Pinelli 18; Hollon 509), with seven consumer entrances and a detached Automobile Center (Pinelli 19, 30). On November 18, 1977, Jennifer Hollon surveyed the store as part of an FTC project to determine the presale availability of warranty information (Hollon 479–80, 508). Orlando P. Pinelli, whose unsworn interview was made part of the record by order issued September 25, 1979, is manager of the Major Appliance Department at Evergreen Park (Pinelli 2). Mr. Pinelli has been appliance manager at Evergreen Park since October 1977 (Pinelli 2).

There was no warranty information at the entrance to the store used by the FTC investigator (Hollon 509, 514).

In the Major Appliance Department, which contains 3600 square feet of selling space, there was a sign placed in a four foot sign holder (Pinelli 3–4, 57). It was the practice in the Evergreen Park Major Appliance Department to remove all papers, including warranties, from display items; the warranty information was then placed in

folders in a file cabinet next to the department manager's desk (Pinelli 36–37). Warranty information was not available in, around or on the products (Hollon 512–13). In the summer of 1978, after the FTC survey, opaque seals were affixed to the front of microwave ovens and gold plastic signs were placed on top of these units (Pinelli 40–43). Ms. Hollon spoke with saleswoman, Ruth Adams, about the warranty for a microwave oven. The saleswoman quoted the terms of the warranty but did not produce a written copy or refer to a binder (Hollon 513). Sales personnel, in Major Appliances, were instructed as to the existence of binders (Pinelli 38–39). They were instructed to inform customers of warranties, but normally they would not show a copy of the written warranty unless the customer requested a copy (Pinelli 44–45, 50).

There were no binders in the Major Appliance Department located on the lower level at Evergreen Park (Pinelli 18–19, 54; Hollon 512–13). The nearest binder was in the CAC located three floors above major appliances (Pinelli 54–57).[7] [19]

No warranty information of any kind was available in the TV/Stereo Department located on the third floor of the store (Hollon 509–10). There were no decals on products, no binders and no signs on the products or on the walls (Hollon 509–10). When asked for a copy of a television warranty, saleswoman, Pat Steegman, gave a brief summary of the warranty terms and service [20]contract. A further request to see a copy of the warranty produced the response "You get a copy of the warranty when you get the TV" (Hollon 510–11). No copy of the warranty was produced for inspection; no mention was made of the existence of a warranty binder (Hollon 511).

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[7] In respondent's rebuttal to complaint counsel's Proposed Findings of Fact, the following statement is made:

> CPF No. 123 is especially misleading and irrelevant. There was no testimony of the need to go to the CAC in order to see a warranty binder in the Evergreen Park, Ill. store. Therefore, distances to the CAC on the 3rd floor are irrelevant as there is no evidence that a prospective buyer would have to leave the basement floor to obtain a warranty binder.

This statement is surprising in view of the testimony of respondent's employee, Orlando P. Pinelli. Mr. Pinelli testified unequivocally that the nearest binder to the Major Appliance Department was located in the CAC on the third floor (Pinelli 54). The Major Appliance Department is on the lower level (Pinelli 18–19).

Q. Okay. What is the nearest binder to your department in the Evergreen Park Store?
A. The warranty binder?
Q. The warranty binder, right.
A. In the CAC Department. (Pinelli 54)

Mr. Pinelli's testimony is clear concerning the location of the two departments; the CAC is on the third floor and the Major Appliance Department is on the lower level.

Q. Okay. Can you tell me where the Customer Accommodation Center is located?
A. Third floor. (Pinelli 20)
Q. And which level would your department be considered on?
A. Lower level. (Pinelli 18–19)

Presumably, respondent asserts that this evidence is irrelevant because of the practice of keeping warranty information in a folder in the department. Maintaining warranty texts in a file drawer, however, does not comply with any of the four alternative methods of warranty disclosure required by the Rule.

A binder was available in the Customer Accommodation Center located on the third floor (Pinelli 20, 28–30). The binder was attached to a metal platform (Pinelli 61–62). There was a sign with the binder to indicate that warranty information was available (Pinelli 32).

77. *Ford City, Illinois*

The Ford City store is located in a mall and was surveyed on November 18, 1977 by Jennifer Hollon (Hollon 541).

No warranty information or signs advising of the availability of warranty information were posted at the store entrance used by the FTC investigator or in the main aisles (Hollon 541–43, 547).

There were no signs or binders in the Major Appliance Department (Hollon 545). An examination of the department including in, on, and around all appliances produced no warranty information (Hollon 543–44). The interiors of appliances were examined by a visual inspection of the interior including the interior of any drawer and the contents of any packets filled with papers (Hollon 544). A conversation with salesman, Gordon Gregory, about the warranty on a refrigerator produced a packet of materials from a desk in the department. Mr. Gregory explained that the packet, which included a warranty, came with the refrigerator when purchased (Hollon 546). Mr. Gregory made no mention of the availability of warranty binders (Hollon 547).

No warranty information was found in the TV/Stereo Department. There were no binders and no signs (Hollon 542). When Ms. Hollon asked salesman Mr. Jachimczak to see a copy of the warranty for a television, he gave her the terms orally. He did not give her a written copy of the warranty nor did he mention a warranty binder (Hollon 542–43).

78. *Yorktown Shopping Center, Lombard, Illinois*

The Montgomery Ward store in Lombard, Illinois is located in a shopping mall (Hollon 485). The store was surveyed on November 11, 1977 by FTC investigator Jennifer Hollon (Hollon 485). At the time the survey was conducted, Don A. Cote was manager of the TV/Stereo Department and Raymond Shallcross was [21]employed as a salesman in major appliances (Cote 1099–1100; Shallcross 190–91).

There were no signs to advise consumers of the availability of warranty information at the entrance to the store nor in the aisles en route to the Major Appliance Department nor those en route to the TV/Stereo Department (Hollon 485, 487, 493, 495–96, 616–17).

The Major Appliance Department had no binder. There was a sign advising the consumer to go to the CAC for warranty information (Hollon 488; Shallcross 896); however, the sign was partially obscured by the microwave display and was not visible from all places in the Major Appliance Department (Hollon 488). There were decals on the inside or outside, or a loose leaflet on the inside of most refrigerators giving the warranty terms and one 8 x 11 sign on a microwave oven (Hollon 487).[8] No other warranty information was found in conjunction with the products (Hollon 487–88).

Ms. Hollon was present when complaint counsel, Benita Sakin, asked salesman, Raymond Shallcross, to see a copy of the warranty for a refrigerator. Salesman Shallcross referred Ms. Sakin to the back of the price tag. After inspecting the price tag, Ms. Sakin pointed out that the information was not warranty information but concerned the service contract. Mr. Shallcross said "you get it (the warranty) on a green slip when you purchase the product" (Hollon 492; Shallcross 893, 899).

The TV/Stereo Department contains approximately 3800–4000 square feet of selling space (Cote 1117). The only warranty information in the department was a sign on one television and a decal on another television (Hollon 494–95). There were no signs and no binders (Hollon 494–95).[9] [22]

There were no signs or binders visible in the Customer Accommodation Department. When Ms. Hollon asked to see a copy of the warranty for a refrigerator, she was shown a binder which contained service contracts. The saleswoman behind the counter in the CAC was unable to produce a warranty binder (Hollon 489–90, 600).

79. *North Riverside Plaza, North Riverside, Illinois*

The Montgomery Ward store in North Riverside, Illinois is a two story store located in a shopping mall (Banis 318; Hollon 496). On separate occasions, the store was surveyed by Commission investigators Dianne Banis and Jennifer Hollon. Ms. Banis examined only the departments themselves, she did not look for signs, binders or other warranty information in the entrances or aisles of the store (Banis 324–27).

In the Major Appliance Department, on the second floor, there

[8] Ms. Hollon did not read the warranties; she skimmed the text. She did not know whether the warranty sign for microwaves applied to all microwaves or just the microwave on which the sign sat (Hollon 593–94, 597). Nor, did she know if the warranty with the refrigerator applied to more than just the one unit (Hollon 592–93). Montgomery Ward uses one warranty for all of its products of a particular genre - for example all color televisions are covered by one warranty (See Finding 23).

[9] Mr. Cote did testify that both a binder and a sign were in his department. However, at trial it was noted that Mr. Cote had stated in his deposition that he "never paid attention to (the) binder" (Cote 1120). Neither the binder nor the sign was permanently affixed (Cote 1119).

were no signs advising of the location of warranty information around the products or on the walls informing the consumer of the availability of warranty information (Banis 320–21; Hollon 497–98). Most of the microwave ovens had a sign with the warranty terms. In about one quarter of the refrigerators which were opened for examination, there were loose leaflets containing warranty terms (Hollon 497, 499). There was no warranty information of any kind for washers, dryers, freezers, and dishwashers (Hollon 497).

Both Ms. Banis and Ms. Hollon requested warranty information from a salesperson in Major Appliances. In Ms. Banis's case, the salesperson pointed out the guarantee stickers on the appliance; however, these stickers were not the full warranty. Further inquiry about a binder of warranties prompted the salesperson to speculate that such a binder might be found in the CAC (Banis 320–21, 328–29). When Ms. Hollon inquired about the warranty on a specific refrigerator, salesperson Wally Riggins pulled a leaflet with warranty terms on it out of the bottom drawer of the refrigerator and told her a capsulized version of the warranty terms (Hollon 498). The salesman made no mention of the availability of a warranty binder (Hollon 499).

Neither surveyor found any warranty information in the TV/Stereo Department. There were no signs and no binders (Banis 318–19, 337; Hollon 500). Ms. Hollon did ask a salesperson for a copy of the warranty for a stereo. The salesperson told her she could go to the CAC and examine a copy of the warranty there (Hollon 500, 604). [23]

The CAC was located near the Major Appliance Department (Banis 322). There were no signs and no binder visible (Banis 322–23, 337; Hollon 502). In both instances, there were lines of customers so that the surveyors had to wait to talk with store personnel behind the counter. When Ms. Banis requested the binder only the supervisor knew of its existence in the CAC; it was kept behind the counter (Banis 322–23). During Ms. Hollon's survey, a request for the binder proved futile; the person behind the counter could not locate the binder and suggested that they check with the Stereo Department and that they should retain written warranties after purchase (Hollon 501–02).

No warranty information was spotted at the store's entrance (Hollon 502).

80. *Laurel, Maryland*

The Laurel, Maryland store is a free-standing, large, one-story

building (Abrams 421). It was surveyed by Irvin Eugene Abrams on December 20, 1977 (Abrams 404).

There were no binders and no signs advising the consumer of the availability of warranty information in the main aisle of the store or at the entrance used by Mr. Abrams (Abrams 421–22, 428–29).

In the Major Appliance Department, twenty to twenty-five products were checked for warranty information; no information was found. There were no binders in the department, not even on the desk in the department, and no signs (Abrams 422–23). Mr. Abrams asked a salesperson if a warranty came with a particular refrigerator; the salesman indicated that the refrigerator was covered by a warranty and quoted some of the terms (Abrams 423–24). When asked for a copy of the written warranty for inspection, the salesman directed Mr. Abrams to the CAC (Abrams 424–25).

In the TV/Stereo Department, the surveyor checked hang tags, the exterior and interior of products, and the general vicinity of the department for warranty information (Abrams 426). No warranty information was available in the department—there were no signs and no binders (Abrams 426). An inquiry as to whether a particular stereo was covered by a warranty produced the response from the saleswoman that the written warranty for that stereo and other products could be seen in the CAC (Abrams 426–27).

The Customer Accommodation Center, located on the other side of the store from the Major Appliance Department, contained a warranty binder (Abrams 425). The binder was clearly visible at [24] a distance of three to four feet from the CAC counter (Abrams 425). There were no signs in the CAC (Abrams 425).

81. *Capital Plaza, Prince George's County, Maryland*

On December 20, 1977, Irvin Eugene Abrams surveyed the Montgomery Ward store at Capital Plaza (Abrams 404). The Capital Plaza store consists of two floors only one of which is a sales floor (Abrams 408).

With the exception of a 9 x 12 inch sign at the elevator which directed customers to the CAC for warranty information, no warranty information was posted on the walls of the store or in the main aisles (Abrams 408–09, 417–18). The area surrounding the elevator is a sales area (Abrams 417).

No warranty information was found in the Major Appliance Department. Approximately 20–25 of the 50–60 products on display were individually checked for warranty information (Abrams 409–10). There were no signs, no binders, and no warranties with the products either affixed to the product or in a packet attached to the

product (Abrams 410–11). Mr. Abrams inquired of a salesperson whether there was a warranty for a certain dishwasher. The salesperson produced a written warranty for another dishwasher indicating that the warranty terms were similar for all dishwashers (Abrams 412, 447). The salesperson stated that the warranty for that particular dishwasher could be obtained in the CAC and, upon further inquiry, indicated that warranties for all products in the department could be found in the CAC (Abrams 412–14, 447–48).

The TV/Stereo Department contained no warranty information. There were no signs and no binders (Abrams 415). A salesperson did produce a written warranty for a color television from the back of the department but declined to go get one for a black and white set if Mr. Abrams was not interested in purchasing (Abrams 416, 448–50). This investigation took place in a busy season—five days before Christmas (Abrams 450).

In the Customer Accommodation Center the binder was visibly on the counter. There were no signs (Abrams 419).

82. *Wheaton Shopping Center, Wheaton, Maryland*

The Wheaton, Maryland store, located in the Wheaton Plaza, is one of two major department stores in the shopping center (Abrams 429). The store has two sales floors comprising 112,000 square feet of selling space; the basement is a warehouse and district office (Abrams 430; Kerin 1188). [25]

On December 20, 1977, Irvin Eugene Abrams surveyed the Wheaton, Maryland store as part of a Federal Trade Commission investigation (Abrams 404). Richard Kerin, store manager of the Wheaton Plaza store, testified as to the implementation of Montgomery Ward's binder policy in the Wheaton store. In his position as store manager, Mr. Kerin made periodic observations of the presence of signs and binders in the Wheaton store (Kerin 1183).

There was a sign located at the main entrance to the Wheaton store (RX 342B; Kerin 1192).

Warranty information was not displayed in conjunction with the products in the Major Appliance Department (Abrams 431). However, an 11" x 14" sign was in the department placed above a counter to which a warranty binder was chained (RX 342B; Kerin 1182–84). The sign was two sided facing both east and west and was visible from over half of the department (Kerin 1205, 1207–08). The sign and binder were located in the most prominent position in the department (Kerin 1232A). Mr. Abrams spoke with a Montgomery Ward salesman in the Major Appliance Department. When Mr. Abrams asked whether a written warranty came with a particular refrigera-

tor, the salesman indicated that the written warranty could be found in the CAC on the second floor (Abrams 432). The salesman did not refer Mr. Abrams to the binder located in Major Appliances (Abrams 440).

No signs or binders were present in the TV/Stereo Department nor was there any warranty information available in conjunction with the product in the form of hang tags or literature with the televisions and stereos (Abrams 434–35, 439).

The Customer Accommodation Center, located on the second floor, was not part of a sales area (Abrams 432, 435). A sign in the CAC indicated that warranty information was available (Abrams 436). Mr. Abrams asked to see the binder; the saleswoman, hired for the Christmas season in the gift-wrap section of the CAC, was unable to produce the binder (Abrams 436–37, 464; Kerin 1178). Mr. Abrams consulted store manager, Richard Kerin, about the presence of a warranty binder in the CAC. Mr. Kerin went to the 11 x 14 orange and white sign at the junction of the gift-wrap and repair counters. A saleswoman behind the repair counter produced a binder from under the counter (Kerin 1173–76). The binder was chained to the counter (Abrams 465; Kerin 1176). **[26]**

83. *Northtown Shopping Center, Blaine, Minnesota*

Jennifer Hollon surveyed Montgomery Ward's mall store in the Northtown Shopping Center on December 15, 1977 (Hollon 569).

No warranty information was present at the store's entrance or in the aisles and areas directly adjacent to the aisles which form the route between the entrance and the TV/Stereo and Major Appliance Departments (Hollon 569–71, 573).

In the Major Appliance Department, the only warranty information seen after looking through the department and in, around and on the products was inside a few refrigerators. There were no signs advising of the availability of warranty information and no binders (Hollon 571–72). Ms. Hollon asked salesman Don Diepholz for a copy of the warranty for an oven. Mr. Diepholz gave an oral summary of the warranty terms and the extended service contract. A second request for a copy of the warranty brought the response that a copy of the warranty came with the product when it was purchased (Hollon 572).

The TV/Stereo Department was examined for the availability of warranty information. After examining in, around and on the products the only warranty information available consisted of two loose leaflets on televisions. There were no signs indicating the availability of warranty information and no binders (Hollon 570).

The CAC was not surveyed.

84. *Southtown Shopping Center, Bloomington, Minnesota*

The Southtown Shopping Center store is one of Montgomery Ward's largest stores (Pagliaro 1043). The Southtown store has 114,000 square feet of selling space located on two floors (Pagliaro 1028, 1065).

On December 15, 1977, the Southtown store was surveyed by Jennifer Hollon (Hollon 573). At the time of the survey, John Pagliaro was store manager and Bruce Ochu was department manager for the TV/Stereo Department (Ochu 985; Pagliaro 1015).

There was no warranty information at the entrance used by the FTC investigator (Hollon 573, 576). Signs were present at three of the seven consumer entrances to the store (Pagliaro 1031, 1067).

In the Major Appliance Department, the only warranty information readily available was a loose copy of the warranty inside three or four refrigerators (Hollon 575). There were no signs or binders in the department (Hollon 575–76). There was a sign and a binder chained to a head-on located in sewing machines; however, an aisle separated sewing machines from the [27]other appliances (Pagliaro 1030, 1034–35). The binder in sewing machines was the nearest binder for information on washers, dryers, ranges and other major appliances. The sign and binder in sewing machines did not face the other appliances across the aisle (Pagliaro 1072–73, 1075). A consumer could enter the Major Appliance Department, purchase an appliance, and leave the department without seeing a warranty sign (Pagliaro 1076).

There was a warranty sign at the top of the down escalator (Pagliaro 1031, 1049). It was mounted on top of the glass that goes around the escalator in a position about six inches from the right hand rail (Pagliaro 1049–50). The sign was present until January 1977 when it was removed as a safety hazard (Pagliaro 1051, 1090).

The TV/Stereo Department is on the second floor about twelve (12) feet across the aisle from the CAC and approximately ten to twelve (10–12) feet from the escalator (Ochu 988, Pagliaro 1040). The department is rectangular and contains 1,500 square feet of selling space (Ochu 989). There are two pillars in the department (Ochu 991). On the day of the survey, there were no warranty signs and no binders in the department. The only warranty information available consisted of a few loose sheets with warranty terms scattered around a few of the televisions and stereos (Hollon 574).

A warranty binder and sign were in the CAC. The binder was chained to the counter (Ochu 1000–01; Pagliaro 1030).

In addition to the binders in the CAC and sewing machine areas, there was a binder chained to the top of a counter in the TBA (Pagliaro 1030). The binder was chained to the only counter in the department; it is the counter where orders are written (Pagliaro 1039). The TBA is part of the main store building in the Southtown Shopping Center store (Pagliaro 1029) and is located near the hardware department (Pagliaro 1038).

85. *Apache Plaza, Minneapolis, Minnesota*

The Apache Plaza store, a mall store with one sales floor, was surveyed by Jennifer Hollon on December 15, 1977 (Hollon 573, 577; Sorenson 1135). Dorothy Sorenson was manager of the Apache Plaza Major Appliance Department for the three year period from March 1976 - July 1979 (Sorenson 1131). The survey was conducted while Ms. Sorenson managed the appliance department.

There was no warranty information at the store entrance, nor was there any warranty information visible en route between the [28] entrance, the TV/Stereo Department and the Major Appliance Department (Hollon 577–78, 580).

The Major Appliance Department consists of approximately 800 to 1,000 square feet of selling space (Sorenson 1136). The department is arranged with four rows of merchandise (Sorenson 1136). There are two posts in the department one near the main aisle and the other towards the wall in the rear of the department (Sorenson 1136–37). On the post in the rear of the department was an orange and white warranty sign placed at eye level (CX 2; Sorenson 1132–33, 1138). The sign, in a metal frame, was affixed to the post with glue in January or February of 1977 (Sorenson 1138, 1140). Ms. Sorenson noted the presence of the sign from the time it was affixed until her transfer to the store in Robbinsdale in July 1979 (Sorenson 1138). The sign was visible from one-half of the department; there was no place in the department where 100 percent visibility could have been achieved (Sorenson 1139, 1158–59).

There was no binder in the Major Appliance Department (Hollon 579; Sorenson 1159). Consequently, salesmen were instructed to direct customers to the CAC for warranty information which could not be obtained with the product in the department (Sorenson 1134). It was a half minute walk to the CAC from the Major Appliance Department (Sorenson 1135–36). Ms. Sorenson had no personal recollection as to whether or not a binder was present in the CAC (Sorenson 1162).

The Major Appliance Department in the Apache Plaza store had a unique system of displaying the written warranty with the product

(Sorenson 1152). The warranty was opened up for viewing, placed in a plastic envelope, and chained to the product. Plastic packets were displayed with all merchandise (Sorenson 1140–44). In the case of refrigerators, ovens, washers, dryers, and freezers the packet was on the inside of the machine; in the case of air conditioners it was chained to the outside. For microwave ovens, the warranty was in a frame placed on top of the microwave oven (Sorenson 1141–43). Consumers always look into the usable area of an appliance (Sorenson 1144–45). Where the appliance was in use as a demonstrator the warranty was displayed on the outside.

Ms. Hollon spoke with salesman Ken Houchins; she asked him if she could see a copy of the warranty for a combination conventional and microwave oven. Mr. Houchins gave a summary of the warranty terms and of the extended service contract but he could not show her a copy of the warranty. He said, "You get the warranty, all the other papers, whenever you buy the product" (Hollon 580). Mr. Houchins did not mention warranty binders (Hollon 580).

In the TV/Stereo Department, Ms. Hollon found no warranty information other than one loose leaflet partially covered by a [29] stereo and one loose leaflet partially covered by a television. There were no binders, no signs, and no conversations with sales personnel (Hollon 577–78).

86. *St. Paul, Minnesota*

The St. Paul, Minnesota store is a multi-level mall store (CX 65B; Hollon 582). The store was surveyed on December 16, 1977 by Commission investigator, Jennifer Hollon (Hollon 582). St. Paul was also the subject of a field audit report dated September 13, 1978 (CX 65A-B). At the time of the survey and of the field report, Paul A. Williamson was manager of the St. Paul Major Appliance Department (Williamson 943).

There was no warranty information at the entrance used by the FTC investigator nor at the up or down escalator (Hollon 582, 584, 586).

The Major Appliance Department consists of 750 square feet of selling space on the first floor of the store (Williamson 968, 977). There is a beam in the center of the department; on one side of the beam is the cash register and on the other side is the salesperson's desk (Williamson 948). At the time of the survey, an 11 x 14 warranty sign (white with black letters) was displayed at eye level on the center beam facing the front of the department (Williamson 949, 964). The sign was stapled to the wood of a bulletin board which was permanently affixed to the beam; the sign was visible from

almost the total area of the department (Williamson 949, 983). In addition to the 11 x 14 sign advising customers where warranty information was available, approximately five microwave ovens had signs in picture frames sitting on top of the ovens (Williamson 958). There were no binders (Hollon 583). The nearest warranty binder in the Fall of 1977 was located in the CAC on the second floor (Williamson 967–68).

During her survey of the Major Appliance Department, Ms. Hollon asked salesman Rick Carlson if she could see a copy of the warranty for a conventional oven. Mr. Carlson orally summed up the terms of the warranty and service contract. When Ms. Hollon repeated her request Mr. Carlson responded that she would get the warranty when she purchased the product (Hollon 583).

A survey of the TV/Stereo Department produced no warranty information. There were no signs and no binders (Hollon 584–585).

The CAC was located on the second floor (Williamson 967–68). It was not surveyed. [30]

87. *Belmont Store, Kansas City, Missouri*

The Belmont store was surveyed on December 7, 1977. This free standing store was in disarray on the day of the survey; a sign stated the store was in the process of closing down its operations (Hollon 548, 608).

An examination of the entranceway and the areas immediately adjacent en route to the Major Appliance and TV/Stereo Departments showed that no warranty information was displayed (Hollon 548, 550).

In the Major Appliance Department, Ms. Hollon examined the area on, around, and in the appliances. An examination of the interior of a product included an examination of any drawers and the contents of any packets containing papers (Hollon 544, 551). On almost every microwave oven, there was a sign with the warranty terms. The signs on the microwave ovens seemed to be identical (Hollon 551, 611). In approximately three refrigerators, there were looseleaf copies of warranties. No other warranty information was available in the department either with the products, on the walls, or in any other area; there were no signs and no binders (Hollon 551–52).

In the TV/Stereo Department, there was one sign on one

television giving warranty terms and one sign on one stereo giving warranty terms (Hollon 549).[10] No other information was available in the department. There were no binders (Hollon 549).

88. *Metro Center North, Kansas City, Missouri*

The Metro Center North store, surveyed by Jennifer Hollon on December 7, 1977, is located in a mall (Hollon 553).

No signs advising the consumer of the availability of warranty information were present at the entrance or in the aisles which formed the route between the entrance, the Major Appliance Department and the TV/Stereo Department (Hollon 553, 556–57). [31]

In the Major Appliance Department, most of the refrigerators and freezers had loose copies of the warranties inside, a couple of washers and dryers had a loose copy of the warranty lying on top of the appliance, and almost all of the microwave ovens had identical signs on top setting out the warranty terms (Hollon 554, 614–15). No other warranty information was available in the department; there were no signs and no binders (Hollon 555). But, Ms. Hollon does not recall if the signs and loose leaflets applied to just the one unit with which they were displayed or to more than one item (Hollon 613–14).

In the TV/Stereo Department, there were no signs and no binders; however, there was warranty information displayed in direct conjunction with the products. On one television, there was a sign with the warranty terms; there was no indication on the sign as to which televisions were covered by the warranty. On one stereo, there was a loose copy of the warranty (Hollon 556–57).

The CAC was not surveyed.

89. *Greenwood Mall, Toledo, Ohio*

On December 21, 1977, the Greenwood Mall store was surveyed by Commission investigator Carole Danielson (Danielson 632).

The Greenwood Mall store has one floor (Danielson 633, 662). In the Major Appliance Department, located approximately halfway through the store (Danielson 634), there were no signs indicating where warranty information might be obtained nor were there any binders visible (Danielson 635–37, 640). A visual inspection of the exterior and interior of most appliances displayed did not reveal any warranty information nor did an examination of the walls and ceiling reveal any signs (Danielson 634–35). However, written

[10] Ms. Hollon does not recall if any brands other than Montgomery Ward's own label were present in the TV/Stereo Department. She does not recall if the signs giving warranty terms were limited to one unit or if they applied to more than one (Hollon 549, 608, 611).

warranties, either loose or visible in plastic packets were present in the vegetable trays of all refrigerators (Danielson 635–36). A salesperson was able to produce a written warranty for a range from inside the broiler pan (Danielson 638–40). The salesperson made no mention of the availability of warranty binders (Danielson 676, 682).

No signs or binders were visible in the Customer Accommodation Center (Danielson 636–37, 665). [32]

90. *Southwyck Mall, Toledo, Ohio*

The two story mall store located in Southwyck Mall was surveyed by Carole Danielson on December 21, 1977 (Danielson 632, 641). Ms. Danielson surveyed only the departments for warranty information. She did not survey the entrances and aisles (Danielson 650–53, 661).

A three to five minute visual search of the Major Appliance Department and its vicinity, as well as an examination of the exterior of all appliances displayed and the interior of half of each type of appliance displayed, produced no warranty information (Danielson 644–45). No written warranty information was contained in the vegetable trays of the refrigerators (Danielson 677). An examination of the sales desk in the department was also fruitless (Danielson 645).

When approached by salesman Joe Sostack, Ms. Danielson asked what type of warranty a particular range carried. The salesman gave an oral summary of the warranty terms. Ms. Danielson then asked to see a copy of the warranty or a warranty binder (Danielson 646, 654). The salesman found a copy of the warranty after looking in five or six ranges (Danielson 646, 654–55). He did not produce the warranty from the interior of the same range she had inquired about (Danielson 647). The warranty was headed "gas and electric ranges" in large letters; it was not limited to a specific range but applied to gas and electric ranges generally (Danielson 657, 660). The salesman made no mention of a warranty binder (Danielson 682).

Ms. Danielson browsed through the TV/Stereo Department and found no signs displayed in connection with the products or generally in the department (Danielson 641–42). The televisions and stereos were examined on the exterior for hang tags, decals, signs, notices, and written copies of the warranties which might be lying on or near the products. About one-third to one-half ($^1/_3$–$^1/_2$) of the products which had doors or parts that were to be opened were examined on the interior (Danielson 642). A sales desk in the department was checked for warranty information. A number of binders on the sales desk were also checked; they contained product specifications. There were no warranty binders in the department

(Danielson 642–43). In the course of demonstrating a stereo console, the saleswoman was asked about the type of warranty which covered the console. She summarized the warranty terms orally. When Ms. Danielson asked to see a written copy of the warranty or a warranty binder, the saleswoman responded that Ms. Danielson could not see the written warranty. She stated that the terms of the warranty were written on the salescheck and that a written copy of the warranty was included in the delivery box (Danielson 642–43, 676). The saleswoman did not direct Ms. Danielson to a place where written warranty information was available even after she was specifically asked about a warranty binder (Danielson 642–44, 676). [33]

91. *Crossroads Shopping Center, Oklahoma City, Oklahoma*

On December 8, 1977, Jennifer Hollon surveyed the Montgomery Ward store at the Crossroads Shopping Center (Hollon 558, 562). The Crossroads store is a mall store (Hollon 562).

There were no signs advising of the availability of warranty information at the store's entrance nor were there signs in the aisles en route to the TV/Stereo Department or the Major Appliance Department (Hollon 562, 566, 569).

In the Major Appliance Department, almost all of the microwave ovens had a sign on top; a few refrigerators had a copy of the warranty inside. There were no other signs in the department concerning warranty terms or the availability of written warranties; there were no binders (Hollon 567). A conversation with salesman Glen Ashley resulted in a verbal summary of the warranty and the extended service contract for a refrigerator. When the salesman was then asked for a copy of the warranty, he produced a copy from his files (Hollon 568). Mr. Ashley did not mention the availability of warranty binders (Hollon 568).

Some loose leaflets located between the products were the only warranty information available in the TV/Stereo Department (Hollon 564). There were no signs advising of the availability of warranty information and no binders, nor was there a leaflet for each item displayed (Hollon 564–65). When Ms. Hollon asked to see a copy of the warranty for a television, salesman Mike Keaton verbally summarized the warranty terms. Ms. Hollon repeated her request for a copy of the warranty to inspect. Mr. Keaton did not show her a copy nor did he direct her to the loose leaf warranties on the shelf rather, he stated, "You will get the copy of the warranty when you buy the product" (Hollon 565–66).

92. *Penn Square Shopping Center, Oklahoma City, Oklahoma*

Jennifer Hollon surveyed the Penn Square store, a mall store, on December 8, 1977 (Hollon 558).

An examination of the entrance and aisles linking the Major Appliance Department, TV/Stereo Department, and the entrance revealed no signs indicating the availability of warranty information (Hollon 558, 560, 562). [34]

Some warranty information was found with the appliances in the Major Appliance Department. A loose copy of the warranty was found in most refrigerators and a sign stating the warranty terms was on almost every microwave oven. A loose leaflet was found in one washer (Hollon 559). No other warranty information was found in the department either in conjunction with the products or in the form of signs or binders (Hollon 559). Saleswoman Maryann Phillips gave an oral summation of the warranty terms when she was asked for a copy of the warranty for a refrigerator. Ms. Hollon was not shown a copy of the refrigerator warranty. When she repeated her inquiry, she was told by Ms. Phillips that she would get a copy when she purchased the refrigerator (Hollon 599–600). Ms. Phillips did not say anything about the availability of a warranty binder (Hollon 560).

Other than a few copies of warranties, some of which were in packets, scattered among the television and stereos, there was no warranty information in the TV/Stereo Department. There were no signs and no binders (Hollon 560–61).

The CAC was not surveyed.

B. Summary of Survey Results

93. There were no warranty binders in the Major Appliance Department of the Montgomery Ward store located at:

(a) Serramonte Shopping Center, California (Austin 276–77)
(b) State Street, Chicago, Illinois (Hollon 503–04)
(c) Evergreen Park, Illinois (Hollon 512–13)
(d) Ford City, Illinois (Hollon 545)
(e) North Riverside Plaza, North Riverside, Illinois (Banis 320–21; Hollon 497–98)
(f) Yorktown Shopping Center, Lombard, Illinois (Hollon 488; Shallcross 896)
(g) Laurel, Maryland (Abrams 422–23)
(h) Capital Plaza, Prince George's County, Maryland (Abrams 410–11)

(i) Northtown Shopping Center, Blaine, Minnesota (Hollon 571–72) [35]
(j) Southtown Shopping Plaza, Bloomington, Minnesota (Hollon 575–76)[11]
(k) Apache Plaza, Minneapolis, Minnesota (Hollon 579; Sorenson 1159)
(l) St. Paul, Minnesota (Hollon 583; Williamson 967–68)
(m) Belmont Store, Kansas City, Missouri (Hollon 551–52)
(n) Metro Center North, Kansas City, Missouri (Hollon 555)
(o) Greenwood Mall, Toledo, Ohio (Danielson 635–37, 640)
(p) Southwyck Mall, Toledo, Ohio (Danielson 644–45)
(q) Crossroads Shopping Center, Oklahoma City, Oklahoma (Hollon 567)
(r) Penn Square Shopping Center, Oklahoma City, Oklahoma (Hollon 559)

94. There were no warranty signs in the Major Appliance Department of the Montgomery Ward store located at:

(a) Serramonte Shopping Center, California (Austin 276–77)
(b) State Street, Chicago, Illinois (Hollon 503–04)
(c) Ford City, Illinois (Hollon 545)
(d) North Riverside Plaza, North Riverside, [36]Illinois (Banis 320–21; Hollon 497–98)[12]
(e) Laurel, Maryland (Abrams 422–23)
(f) Capital Plaza, Prince George's County, Maryland (Abrams 410–11)
(g) Northtown Shopping Center, Blaine, Minnesota (Hollon 571–72)
(h) Southtown Shopping Center, Bloomington, Minnesota (Hollon 575–76)[13]
(i) Belmont Store, Kansas City, Missouri (Hollon 551–52)[14]
(j) Metro Center North, Kansas City, Missouri (Hollon 554–55, 615)[15]
(k) Greenwood Mall, Toledo, Ohio (Danielson 635–37, 640)[16]
(l) Southwyck Mall, Toledo, Ohio (Danielson 644–45)

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[11] There was a binder and a sign located in sewing machines; however, they were separated from the other appliances by an aisle and were not visible from the area in which the other appliances were located.

[12] Most microwaves had a sign with warranty terms. About one-quarter of the refrigerators examined had loose leaflets.

[13] See Finding 93, note 11.

[14] On almost every microwave, there was a sign.

[15] Most of the refrigerators and freezers had loose copies of the warranties inside, a couple of washers and dryers had a loose copy of the warranty lying on top of the appliance, and almost all microwaves had signs.

[16] Written warranties, either loose or visible in packets were in the vegetable trays of all refrigerators.

(m) Crossroads Shopping Center, Oklahoma City, Oklahoma (Hollon 567)[17]
(n) Penn Square Shopping Center, Oklahoma City, [37]Oklahoma (Hollon 559)[18]

95. There were no warranty binders in the TV/Stereo Department of the Montgomery Ward store located at:

(a) State Street, Chicago, Illinois (Hollon 505)
(b) Evergreen Park, Illinois (Hollon 509–10)
(c) Ford City, Illinois (Hollon 542)
(d) North Riverside Plaza, North Riverside, Illinois (Banis 318–19, 337; Hollon 500)
(e) Yorktown Shopping Center, Lombard, Illinois (Hollon 494–95)
(f) Southtown Shopping Center, Bloomington, Minnesota (Hollon 574)
(g) Apache Plaza, Minneapolis, Minnesota (Hollon 577–78)
(h) St. Paul, Minnesota (Hollon 584–85)
(i) Laurel, Maryland (Abrams 426)
(j) Capital Plaza, Prince George's County, Maryland (Abrams 415)
(k) Northtown Shopping Center, Blaine, Minnesota (Hollon 570)
(l) Belmont Store, Kansas City, Missouri (Hollon 549)
(m) Metro Center North, Kansas City, Missouri (Hollon 556–57)
(n) Southwyck Mall, Toledo, Ohio (Danielson 642–43)
(o) Crossroads Shopping Center, Oklahoma City, [38]Oklahoma (Hollon 564–65)
(p) Penn Square Shopping Center, Oklahoma City, Oklahoma (Hollon 560–61)
(q) Wheaton Shopping Center, Wheaton, Maryland (Abrams 434–35, 439)

96. There were no warranty signs in the TV/Stereo Department of the Montgomery Ward store located at:

(a) State Street, Chicago, Illinois (Hollon 505)
(b) Evergreen Park, Illinois (Hollon 509–10)
(c) Ford City, Illinois (Hollon 542)
(d) North Riverside Plaza, North Riverside, Illinois (Banis 318–19, 337; Hollon 500)
(e) Yorktown Shopping Center, Lombard, Illinois (Hollon 494–95)
(f) Laurel, Maryland (Abrams 426)

[17] Almost all microwaves had a sign on top; a few refrigerators had a copy of the warranty inside.

[18] A loose copy of the warranty was found in most refrigerators and a sign with warranty terms on almost every microwave.

(g) Capital Plaza, Prince George's County, Maryland (Abrams 415)
(h) Wheaton Shopping Center, Wheaton, Maryland (Abrams 434–35, 439)
(i) Northtown Shopping Center, Blaine, Minnesota (Hollon 570)
(j) Southtown Shopping Center, Bloomington, Minnesota (Hollon 574)
(k) Apache Plaza, Minneapolis, Minnesota (Hollon 577–78)
(l) St. Paul, Minnesota (Hollon 584–85)
(m) Belmont Store, Kansas City, Missouri (Hollon 549)[19] [39]
(n) Metro Center North, Kansas City, Missouri (Hollon 556–57)[19]
(o) Southwyck Mall, Toledo, Ohio (Danielson 641–42)
(p) Crossroads Shopping Center, Oklahoma City, Oklahoma (Hollon 564–65)
(q) Penn Square Shopping Center, Oklahoma City, Oklahoma (Hollon 560–61)

97. There were no warranty binders located in the CAC of the Montgomery Ward store located at:

(a) Serramonte Shopping Center, California (Austin 285–87)
(b) North Riverside Plaza, North Riverside, Illinois (Banis 322–23, 337; Hollon 502)
(c) Yorktown Shopping Center, Lombard, Illinois (Hollon 489–90, 600)
(d) Greenwood Mall, Toledo, Ohio (Danielson 636–37, 665)

98. There were no warranty signs in the CAC at:

(a) Serramonte Shopping Center, California (Austin 285–87)
(b) North Riverside Plaza, North Riverside, Illinois (Banis 322–23, 337; Hollon 502)
(c) Yorktown Shopping Center, Lombard, Illinois (Hollon 489–90, 600)
(d) Laurel, Maryland (Abrams 425)
(e) Capital Plaza, Prince George's County, [40]Maryland (Abrams 419)
(f) Greenwood Mall, Toledo, Ohio (Danielson 636–37, 665)

99. The Pre-Sale Rule requires that either a binder or a sign be displayed in a manner reasonably calculated to elicit the prospective buyer's attention. In the following departments, there were neither signs nor binders:

[19] There was one sign on a TV and one sign on a stereo. On Wards' products, a single warranty covers all of the same type of product. For example, there is one warranty for all Wards' color televisions.

a. Serramonte Shopping Center, California
Major Appliance (Austin 276–77)

b. State Street, Chicago, Illinois
Major Appliance (Hollon 503–04)
TV/Stereo (Hollon 505)

c. Evergreen Park, Illinois
TV/Stereo (Hollon 509–10)

d. Ford City, Illinois
Major Appliance (Hollon 545)
TV/Stereo (Hollon 542)

e. North Riverside Plaza, North Riverside, Illinois
Major Appliance (Banis 320–21; Hollon 497–98)
TV/Stereo (Banis 318–319, 337; Hollon 500)

f. Yorktown Shopping Center, Lombard, Illinois
TV/Stereo (Hollon 494–95)

g. Laurel, Maryland
Major Appliance (Abrams 422–23)
TV/Stereo (Abrams 426)

h. Capital Plaza, Prince George's County, Maryland
Major Appliance (Abrams 410–11)
TV/Stereo (Abrams 415)

i. Northtown Shopping Center, Blaine, Minnesota
Major Appliance (Hollon 571–72)
TV/Stereo (Hollon 570)

j. Southtown Shopping Plaza, Bloomington, Minnesota [41]
Major Appliance (Hollon 575–76)[20]
TV/Stereo (Hollon 574)

k. Apache Plaza, Minneapolis, Minnesota
TV/Stereo (Hollon 577–78)

l. St. Paul, Minnesota
TV/Stereo (Hollon 584–85)

m. Belmont Store, Kansas City, Missouri
Major Appliance (Hollon 551–52)
TV/Stereo (Hollon 549)

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[20] See Finding 93, note 11.

n. Metro Center North, Kansas City, Missouri
Major Appliance (Hollon 554–55, 615)
TV/Stereo (Hollon 556–57)

o. Greenwood Mall, Toledo, Ohio
Major Appliance (Danielson 635–37, 640)

p. Southwyck Mall, Toledo, Ohio
Major Appliance (Danielson 644–45)
TV/Stereo (Danielson 641–43)

q. Crossroads Shopping Center, Oklahoma City, Oklahoma
Major Appliance (Hollon 567)
TV/Stereo (Hollon 564–65)

r. Penn Square Shopping Center, Oklahoma City, Oklahoma
Major Appliance (Hollon 559)
TV/Stereo (Hollon 560–61)

1. *Wards' Audits Concerning Pre-Sale Availability*

100. Respondent's field audit reports (CX 57A–78B) show the following stores were not in compliance with respondent's binder and sign policy:

a. Baton Rouge, Louisiana 9/21/77
No binder - CAC [42]

b. Lake Charles, Louisiana 10/12/77
No binder - CAC

c. St. Petersburg, Florida 11/30/77
No sign - Major Appliance
main entrance
escalator/elevator

d. Ann Arbor, Michigan 3/16/78
No sign - entrance
CAC

e. Mt. Vernon, Illinois 2/17/78
No binder - CAC
No sign - anywhere in store

f. Greensboro, North Carolina 8/5/77
No sign - Major Appliance
main entrance
escalator

g. Monroe, Louisiana 11/4/77
No binder - CAC

h. Penn Square, Oklahoma City, Oklahoma 12/12/77
Binder not properly displayed CAC

i. St. Paul, Minnesota 9/13/78
No binder - first & third levels
No sign - Dept. 38

j. Piqua, Ohio 5/3/77
Binders not properly displayed

k. Wheaton, Maryland 6/6/77
No binder - first floor
No sign - Auto service
Major Appliance
main entrance
escalator/elevator
Binder not properly displayed CAC

l. Torrance, California 10/19/78
No binder - on one of four floors
No sign - main entrance
escalator/elevator

m. Corte Madera, California 10/20/78
No sign - main entrance

n. Grants Pass, Oregon 7/6/78 [43]
No sign - Auto service
main entrance

o. Costa Mesa, California 6/27/78
No sign - Auto service
Binders not properly displayed in CAC and Auto service
Signs obscured CAC and Major Appliance
Six of seven employees were either unaware of binders or did not know their location

p. Porterville, California 6/7/78
No sign - main entrance
Auto service
CAC

q. Norwalk, California 6/6/78
No sign - Major Appliance
main entrance
Auto service
Appliance salesman was not aware binder existed.

r. Fremont, California 4/28/78
No sign - TV/Stereo
Binders not properly displayed: binder in CAC left behind counter, but there was a sign indicating its availability.

s. Escondido, California 3/29/78
No sign - Major Appliance
main entrance
Two appliance salesmen were not aware of the existence of warranty binders.

t. Stockton, California 11/29/77
No binders were displayed
No signs at any location.
Of the six applicable department managers none knew where the binder was being stored and five did not know of its existence.

u. Anderson, Indiana 7/20/77
Binders not properly displayed
No signs

v. Riverside, California 12/15/77
Binder not displayed
CAC manager not aware of its existence [44]

Respondent's own field audit reports corroborate the results of the Commission's survey insofar as both indicate that all Wards' stores were not in compliance with Wards' announced binder policy.

2. *Responses by Certain Salesmen in Response To Requests For Copies of Warranty During FTC Survey*

101. In the following stores, sales personnel did not furnish a copy of a written warranty when an FTC investigator asked to see warranties for particular products. Nor did they inform the individuals making such requests of the availability of warranty binders. In a number of instances, in response to such requests for written warranties, Wards' sales personnel gave oral summaries of the

warranty and/or stated the written warranty would be made available upon purchase.

a. State Street, Chicago, Illinois
TV/Stereo (Hollon 506)

b. Evergreen Park, Illinois
Major Appliance (Hollon 513)
TV/Stereo (Hollon 510–11)

c. Ford City, Illinois
TV/Stereo (Hollon 542–43)

d. Yorktown Shopping Center, Lombard, Illinois
Major Appliance (Hollon 492–93; Shallcross 893, 899)

e. Northtown Shopping Center, Blaine, Minnesota
Major Appliance (Hollon 572–73)

f. Apache Plaza, Minneapolis, Minnesota
Major Appliance (Hollon 580)

g. St. Paul, Minnesota
Major Appliance (Hollon 583–84)

h. Southwyck Mall, Toledo, Ohio
TV/Stereo (Danielson 643–44, 676)

i. Crossroads Shopping Center, Oklahoma City, Oklahoma
TV/Stereo (Hollon 565–66)

j. Penn Square Shopping Center, Oklahoma City, Oklahoma
Major Appliance (Hollon 560) [45]

C. Violations Found

102. The failure to place a warranty binder on the lower level of Wards' Evergreen Park Store, where that outlet's Major Appliance Department is located, caused prospective customers in that department to go to the third floor (three floors above) to consult a warranty binder (Finding 76). The absence of a binder on every floor constitutes the failure to place binders in a location with ready access as required by the Pre-Sale Rule.

103. The failure in the period September 1, 1977 to February 1, 1978 to have a warranty binder in the CAC's of some stores in accordance with respondent's policy (Finding 97) and the representation on respondent's warranty signs, CX 2 (Finding 30) deprived prospective customers of ready access to warranty binders in contravention of the Pre-Sale Rule.

104. In the absence of binders and/or warranty signs displayed in the Major Appliance or TV/Stereo Departments of certain stores, prospective customers in those departments were unlikely to get notice of the availability of warranty information in those stores. The failure to display either warranty binders or signs in those departments accordingly constituted a failure to display signs or binders in a manner reasonably calculated to elicit the prospective buyer's attention in contravention of Section 702.3(a)(1)(A) and (B) of the Pre-Sale Rule (Finding 99).

105. Some of respondent's sales personnel were either unable or unwilling to furnish copies of warranties upon request failing at the same time to advise prospective buyers of the existence or location of warranty binders (Finding 101). In those instances where sales personnel did not make a copy of a warranty available on request and failed to advise consumers of the availability of warranty binders their actions conflicted with the instructions for access on Wards' warranty signs. The notice of availability of and the instructions for obtaining access to binders were particularly frustrated, when some sales personnel stated that the warranty would be made available on purchase of the product. The failure by Wards' sales personnel to direct consumers to warranty information rendered the instructions on respondent's warranty signs for obtaining access [46]to binders inaccurate.[21] This violated the requirements of Section 702.3(a)(1)(B) of the Pre-Sale Rule concerning instructions for gaining access to warranty binders.

VI. DISCUSSION

Section 102(b)(1)(A) of the Magnuson-Moss Warranty Act, 15 U.S.C. 2302(b)(1)(A), directs the Commission to prescribe rules requiring that written warranties be made available prior to sale. The Pre-Sale Rule, 16 C.F.R. 702.3, is the Commission's response to that directive.

This is a case of first impression concerning construction of the regulations defining the retail seller's duty under the Pre-Sale Rule. The primary focus of this proceeding is on that part of the regulation defining the seller's duties if he elects to use the binder method of making warranty texts available prior to sale.

The purpose of 16 C.F.R. 702 is to enable the consumer to examine the written warranty prior to consummating the sale. Before the Rule, warranties were often enclosed in a sealed package and not

[21] "Any sales person will direct you to these or other convenient warranty information locations" (CX 2).

available to consumers until after the sale thereby making it impossible for consumers to consider warranty information in their purchasing decisions (40 Fed. Reg. 60182 (1975)).

The Rule offers the retailer four methods of making warranties available to consumers. The seller of a consumer product with a written warranty shall:

(1) make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

(i) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or
(ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each [47]department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such department, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s) . . . . The seller shall either:

(A) display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

(B) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or

(iii) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

(iv) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies;

The Rule is phrased in the disjunctive, and the seller must comply with one of the four listed methods for each warranted product costing over $15. The seller may use more than one method of compliance within his retail operation, but must utilize at least one of the prescribed methods for each product (40 Fed. Reg. 60183 (1975)).

Wards chose the second method, the binder and sign method, as its primary means of compliance with the Rule. Although there is evidence that Wards also used other disclosure methods, this case has been tried essentially on the issue of compliance with the binder method. [48]

A. The Binder Option

Under the Rule's binder option, the retailer must meet two

requirements, first the binders must be placed in each department where warranted goods are sold or in a location within the store providing ready access, second a binder or a number of binders must be placed so that they are reasonably calculated to elicit the prospective buyer's attention. As an alternative to displaying binders in a manner reasonably calculated to elicit the prospective buyer's attention, the retailer may make the binders available to buyers on request *and* place signs reasonably calculated to elicit the prospective buyer's attention which advise him of the availability of the binders including instructions for obtaining access.

B. The Position Of The Parties On Interpretation Of The Rule

The primary issues presented are the meaning of the term "a location which provides the prospective buyer with ready access" and the phrase "reasonably calculated to elicit the prospective buyer's attention." The construction of the Rule advanced respectively by the Commission staff and Wards cannot be reconciled.

Complaint counsel interpret the binder option of the Rule to require large retailers to place binders in each department or in a number of locations providing "ready access". Small retailers or small stores of a chain retailer, according to complaint counsel, may have one binder in a single location providing ready access to the entire store (CB 46).

In complaint counsel's view, taking into consideration the size and configuration of Wards' stores, respondent cannot comply with the rule by maintaining a single binder at one or two locations in a large multi-floor retail store (CRB 5). Wards' failure to place binders at locations "not near the point of sale," according to complaint counsel, deters consumer use and thus contravenes the ready access requirement of the Rule (CB 50).

Expressly disavowing the contention that, on its face, the Rule requires respondent to maintain a binder in every department of every store (CRB 5, 52), complaint counsel nevertheless maintain that "[d]ue to the size of its [Wards] stores, the ready access requirement itself would generally demand a binder in each department" (CRB 52). [49]

To comply with the second requirement of the Rule, complaint counsel state that: "respondent must place signs indicating the location of warranty binders so that they are clearly visible to prospective buyers who are examining applicable consumer products within the store, because placement of such signs at any other location would not be 'reasonably calculated to elicit the prospective buyer's attention!'" (CRB 3).

Respondent rejects the contention that the Rule's requirements differ for large and small stores asserting that there is no language in the Rule placing different obligations on a retailer depending on size of the store (RRB 18).

Respondent contends that the Pre-Sale Rule is clear and specific on its face and that Wards has complied with its precise language (RRB 13). Wards in fact asserts that its binder policy exceeds the literal requirements of the Rule (RB 1).

Respondent states that the Commission, in enacting the Rule, considered assertions that binders should be placed at the point of sale and intentionally refrained from imposing such a requirement (RRB 15). Wards contends that the rule permits the use of warranty binders outside the immediate selling area (RRB 14–16). According to respondent, the Pre-Sale Rule is not a "while examining rule". It maintains the Rule requires no more than that the warranty information must be imparted to the consumer prior to consummation of the sale (RRB 21).

C. Background And Purpose Of The Rule

The mere fact that an administrative rule requires interpretation does not constitute an amendment of the rule. Therefore, the construction of a rule consistent with its text and purpose in the course of an adjudicative proceeding does not constitute an "amendment" of the rule contrary to due process. As the Southern District of New York held on the basis of analogous arguments:

> As is not unheard of, the determination of the charge will or may require construction and application of the rule. As is also familiar, the rule may in the process become clearer, more precise, more specifically defined—as has been true, say of endless statutes, the Constitution, and other administrative rules in many settings. To predict the rule will inevitably be "amended" is at this point an empty form of words. There is thus no foundation for the conclusion that the agency [50]cannot adjudicate the case before it but must, as the A&P steadily repeats hold an amendatory rulemaking proceeding.
>
> * * * * * * *
>
> It is, moreover, an unattractive novelty to insist that the agency may not consider in an adjudication the precise and detailed meaning of its own regulation . . . . *Great Atlantic & Pacific Tea Co.* v. *F.T.C.*, 1974–1 Trade Cases ¶ 75,080 at 96,815, 96,816 (S.D.N.Y. 1974).

Respondent insists that the language of the Rule is unambiguous and urges usage of the plain meaning rule of statutory construction. Under that approach, interpretation of the Rule should be limited to the text of the regulation (RB 9–10). Following the plain meaning

approach, Wards relies on the dictionary meaning of the words "ready access", asserting this term is synonymous with an ability to obtain or make use of without delay (RB 20). It insists no further construction is appropriate. Complaint counsel claims that the plain meaning rule does not apply (CRB 6).

To a considerable degree, the decision herein turns on the construction of two phrases "ready access" and "reasonably calculated to elicit the prospective buyer's attention." Both are undefined in the regulation and subject to various meanings. Under the circumstances, the plain meaning rule must give way to the need for interpretation of these phrases.

Unless the statute's words expressly forbid it, the plain meaning doctrine has always been subservient to a truly discernible legislative purpose whether ascertained from the context of the statute or by recourse to legislative history. *Wilderness Society* v. *Morton,* 479 F.2d 842, 855 (D.C. Cir. 1973), *cert. denied,* 411 U.S. 917 (1973); *District of Columbia* v. *Orleans,* 406 F.2d 957–59 (D.C. Cir. 1968). The courts have repeatedly recognized that:

> [W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter "how clear the words may appear on 'superficial examination'."

Harrison v. *Northern Trust Co.,* 317 U.S. 476, 479 (1943); *Train* v. *Colorado Pub Int. Research Group,* 426 U.S. 1, 9–10 (1976); *U.S.* v. *American Trading Association,* 310 U.S. 534, 543–544 (1940). [51]

Words undefined in a statute must not be construed in the abstract by resorting solely to the dictionary. Rather, the words of a statute should be construed to further rather than frustrate the legislative intent or purpose. *Bartok* v. *Boosey & Hawkes, Inc.,* 523 F.2d 941, 947 (2nd Cir. 1975).[22] The starting point for determining legislative purpose and from the purpose the intended meaning of the terms of the statute is an appreciation of the mischief which the legislation is to alleviate. *ICC* v. *J-T Transport Co.,* 368 U.S. 81, 107 (1961) Mr. Justice Frankfurter (dissenting opinion); see also *Liberation News Service* v. *Eastland,* 426 F.2d 1379, 1383 (2nd Cir. 1970) (referring to Justice Frankfurter's comment in *J-T Transport*).

In this case, analysis of the purpose or intent behind the Rule should start with the Commission's Statement of Basis and Purpose (40 Fed. Reg. 60168 *et seq.* (1975)). The purpose of the Rule is to make

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[22]

" . . . [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Bartok v. *Boosey & Hawkes, Inc.,* 523 F.2d at 947 citing L. Hand *Cabell* v. *Markham,* 148 F.2d 737, 739 (2nd Cir.), *aff'd.,* 326 U.S. 404 (1945).

warranty information available prior to sale so that the consumer can base his decision to buy on the warranty as well as factors such as the cost and qualities of the product (Address by Congressman Eckhardt cited in 40 Fed. Reg. at 60182). The mischief at which the Pre-Sale Rule is aimed was the fact that:

> Warranty information is currently either unavailable or difficult to procure at the point of sale . . . (40 Fed. Reg. at 60182).

At a minimum, it is the purpose of the rule that written warranties and the information where warranties can be secured be made available prior to sale. It is also clearly the intent of the rule that the consumer be apprised of the availability of warranty information independent of oral inquiry from sales personnel. [52]

D. Ready Access

The large retailer as well as the small retailer comes within the ambit of the rule; consequently, the binder option of the rule was drafted to provide a flexible method of compliance to be geared to the size and configuration of the individual store.

The Statement of Basis and Purpose compares large retail operations, many of which contain multiple departments, with small retail operations. While there was testimony in the rulemaking proceeding indicating that a binder per department would be a reasonable means of compliance for large multi-department stores, there is no mandate under the final rule that large multi-department stores have a binder in each department (40 Fed. Reg. 60183–84 (1975)). The final Rule was designed to heed the retailers' cry for greater flexibility (40 Fed. Reg. at 60183).

Originally, the Rule required that a binder be placed in each department.[23] That language of the binder option was modified on the basis of the following rationale:

> This sub-paragraph requires that the binders be maintained either in the department where the warranted product is sold, or in a location which provides the prospective buyer with ready access to the binders. Gambles, in its written submission, noted that "(w)hile the provision that binders be kept on a departmental basis is reasonable in the case of large retail outlets where it would be a burden on the customer to require that he or she go to one specific location in the store to find the binders, there are many small retail outlets which may have merchandise laid out by department, yet are small enough so that one complete set at a single location in the store would suffice."

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[23] "[M]aintain a binder or series of binders in each department in which any consumer product with a written warranty is offered for sale, containing copies of the warranties for the products sold in such department (40 Fed. Reg. at 60183)."

Thus, in such instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold (40 Fed. Reg. at 60184). [53]

It is clear, from examination of the Rule and the purpose behind it, that factors such as number of departments, size and configuration of the store, were important factors considered by the drafters of the rule in formulating the ready access concept. As the Commission noted, placing binders in a single location would be permissible in the case of those retailers where the retailer is "small enough so that one complete set at a single location in the store would suffice."[24] However, taking into consideration the purpose of the Rule and the regulation as a whole, a single location will not suffice "where it would be a burden on the customer to require that he or she go to one specific location in the store" (40 Fed. Reg. at 60184).

In this proceeding, there has been little factual evidence developed concerning the behavior of the consumer in department stores.[25] Although, the record contains considerable information about the dimensions of Wards' stores, there is a dearth of evidence as to what distance in space and/or time a consumer may reasonably be expected to travel to consult warranty binders. Nevertheless, based upon an examination of the Statement of Basis and Purpose, the language of the Rule, and the record (including Ward's own decision to place a binder on every floor)[26] it appears that in large multi-department retail operations a minimum of a binder on every sales floor is necessary to constitute ready access.

In any event, the Pre-Sale Rule does not require that binders be placed in a sales area when the option for a location providing ready access is exercised. The Statement of Basis and Purpose demonstrates that the Commission considered the contention that warranty binders should be located in the sales or display area so that warranty information would be available at [54]the time that products were examined.[27] However, the revision of the Rule, which permits the placing of binders in a location providing ready access as an alternative to locating binders in each selling department, testifies to the fact that the Commission did not accept the contention that warranty binders must be at the point of sale. The Commission itself stated in commenting on the Rule: "Thus, in such

[24] The Statement of Basis and Purpose includes Gambles written submission on this point (40 Fed. Reg. 60184 (1975)).

[25] Only one consumer witness, Mr. Gelder, testified.

[26] Other than the binders placed in the CAC and TBA, Wards' policy was to include two other binders for multi-level stores. "In those stores, the store manager *must* select a central location, by floor . . . " for placement of the other two binders (CX 10A).

[27] "'Consumers will not be rapidly convinced (if at all) that they should run back and forth between display area and location of warranty binder'" (Knauer Transcript cited at 40 Fed. Reg. at 60183 n. 194).

instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold" (40 Fed. Reg. at 60184). Since the Regulation cannot be construed as requiring that warranty binders be available at the point of sale, the ready access alternative cannot be equated with placement of binders in a sales area.

The conclusion on this point derives added force from the fact that the Commission in its final formulation of the binder option in the Pre-Sale Rule considered the "logistics and expense of setting up and maintaining a binder system" and the fact that such expense would be reflected in terms of higher prices (40 Fed. Reg. at 60183, note 193).

The binder option is distinguishable from the other disclosure methods sanctioned by the Rule which do require that the warranty texts be available at the point of sale.[28] The non-binder options under the Pre-Sale Rule in effect require disclosure so that the customer can examine the warranty text while examining the product. The contrast between the binder method and the other disclosure methods specified by the Rule is significant. The Commission could have required that binders be displayed in "close proximity" to the product or "at the point of sale." It chose not to follow that course. Evidently, the disclosure standard was formulated differently for the binder option because of the "logistics and expense" inherent in that [55]method. Considering the Regulation as a whole and the legislative background, "ready access" cannot be construed as synonymous with "at the point of sale" or "in a sales area."

Accordingly, the test in determining whether a location provides ready access to a binder depends on whether it would be an undue burden to require the consumer to go to that location.[29] There is little information in this record concerning consumer behavior in retail stores from which a determination can be made as to the point where the burden of going to a particular location to consult a warranty binder becomes undue.[30] Mere reluctance by consumers to consult collateral material away from the point of sale is not equivalent to an undue burden. When the Commission formulated the Rule it had

[28] Under 702.3(a)(1)(i), the warranty text must be displayed *in close conjunction to each warranted product;* under 702.3(a)(1)(iii), the text of the warranty is to be displayed on the package so that it is clearly visible to prospective buyers *at the point of sale;* 702.3(a)(1)(iv), permits a notice disclosing the text of the written warranty *in close proximity to the warranted product* in a manner which clearly identifies to prospective buyers product to which the notice applies (emphasis added).

[29] See, views of Gamble Adopted at 40 Fed. Req. at 60184.

[30] There is evidence that in one of Wards' largest stores it takes approximately two minutes to traverse a sales floor (Pagliaro 1043). On this record, absent additional evidence on consumer behavior, no finding can be made one way or the other whether such a two minute walk constitutes an undue burden.

before it evidence of the consumer's reluctance to consult collateral materials away from the point of sale.[31] The text of the binder option, unlike the other disclosure methods specified by the Rule, does not take such reluctance into account. Therefore, the test of ready access, namely undue burden of going to a particular location, is not equivalent to mere reluctance by the consumer to consult binders away from the point of sale. It is clear, however, that requiring consumers to go from one floor to another to examine such materials would constitute an excessive burden.[32] [56]

The Rule clearly gives retailers the choice between placing binders "in each department *or* in a location which provides ready access" (emphasis added). It may be necessary in certain stores, depending upon the characteristics of the individual outlets, that binders be placed in a number of locations providing ready access to ensure the standard has been met. As a matter of law, the regulation does not require that, for any class of stores, binders must be placed in each department selling warranted goods. Having given retailers the choice between the two alternatives, the Commission must make a factual showing in the case of the particular retailer that ready access can only be met by placing binders in each department if it wishes to impose that burden. This record does not contain sufficient factual data to support such a determination.[33]

E. Reasonably Calculated To Elicit The Prospective Buyer's Attention

The additional requirement that signs and/or binders be placed in a manner reasonably calculated to elicit the prospective buyer's attention is also subject to interpretation. One must examine the term "reasonably calculated to elicit the prospective buyer's attention" in light of its context within the rule.[34] The binder option is the second of four options the retailer must choose from. The other options require the retailer to:

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[31] 40 Fed. Reg. at 60183 n. 194.

[32] Consider, for example, the Major Appliance Department in Wards' Evergreen Park, Illinois store. Evergreen Park is a four story store with four sales levels, *i.e.*, a lower level, a first, second and third floor. The Major Appliance Department is located on the lower level and the nearest warranty binder is located in the CAC on the third floor. In the case of the Evergreen Park Major Appliance Department, the prospective buyer must travel up three floors to have access to a warranty binder (Pinelli 54; Finding 76). See also, the Major Appliance Department in Wards' St. Paul, Minnesota store. The nearest binder in the Fall of 1977 was in the CAC on the second floor. The Major Appliance Department in the St. Paul store was on the first floor (Williamson 967–68; Finding 86).

[33] The Commission in *George's Radio and Television Company, Inc.*, F.T.C. Docket No. 9115 Order Issued Nov. 7, 1979, required in that proceeding that a binder be located in each department of the retail outlet. The order in question was agreed to by respondent on appeal. The issue of whether large retail outlets must have a binder in each department selling warranted goods as opposed to a location which provides ready access was not litigated in that case. Therefore, the decision and order in *George's Radio and Television* is not controlling on this point.

[34] Discussion pp. 49–51.

1. clearly and conspicuously display the text of the written warranty *in close conjunction to each warranted product;* and/or

3. display the package of any consumer product on which the text of the written warranty is [57]disclosed, in a manner such that the warranty is clearly visible to prospective buyers *at the point of sale;* and/or

4. place *in close proximity to the warranted consumer product* a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies.

16 C.F.R. 702.3(1) (emphasis added).

The mischief at which the Rule was directed viz., unavailability of warranty information prior to sale,[35] can be cured by requiring that warranty information or instructions to secure such information be displayed at the point of sale or in close proximity thereto.

In each of the nonbinder options, the warranty text is to be displayed at the point of sale. The binder option differs from the other methods specified by the Rule in not requiring, although permitting, the display of warranty information at the point of sale. The binder option, at a minimum, requires notice of the availability of the information be displayed so that the customer is likely to see it prior to his purchase.

"Reasonably calculated to elicit the prospective buyer's attention" must be read, in context with the three nonbinder options, to require that notice of the availability of warranty information in the form of binders or signs be in sufficient proximity to the point of sale so that buyers are likely to see such notice before making their purchases.

A close reading of the binder option shows that the requirement that signs and/or binders be displayed in a manner reasonably calculated to elicit the prospective buyer's attention is intertwined with the ready access provision. If the consumer is unaware that the information exists there can be no access, ready or otherwise. Section 702.3(a)(1)(B) is a notice requirement and thus, inherently stricter than the ready access provision. Although the sign need not necessarily be in a display area in order to provide the requisite notice, it must be in sufficient proximity to the point of sale so that it is likely to be seen before the purchase is made. In short, to comply with the purpose of the Rule by using the binder option, [58]there must at least be a sign and/or binder sufficiently close to the point of sale so that, as a practical matter, the consumer is likely to receive notice of the availability of warranty information prior to sale.

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[35] 40 Fed. Reg. at 60182.

VII. VIOLATION

The record shows instances in which Wards has violated 16 C.F.R. 702.3(a)(1)(ii) by failing to maintain warranty binders in a location providing prospective buyers with ready access to such binders. In addition, respondent has violated Section 702.3(a)(1)(ii)(B) by failing to display, in prominent locations reasonably calculated to elicit the prospective buyer's attention, signs advising of the availability of the binders, including instructions for obtaining access.[36]

A. Binders were not present in the CAC's of some of Respondent's Stores in the Period September 1, 1977 to February 1, 1978.

Respondent selected the binder option of the Pre-Sale Rule as its primary means of compliance. In conjunction with that decision, it selected the CAC as one of three locations which would provide a prospective buyer with ready access to warranty information (Findings 24, 32).

The FTC survey, in the latter part of 1977, found that respondents failed to have warranty binders available in the CAC [59]of some stores. The survey results show four (4) instances in which the binder was not available in the CAC (Finding 97). The results of the FTC survey on this point are confirmed by respondent's admission that it did not have a binder present at some Customer Accommodation Centers during the period September 1, 1977 to February 1, 1978 (RA 22) and by certain of respondent's field audit reports (CX 57(B), 58(b), 63(b), 78(b)).

To the extent that binders were not present in the CACs of some stores, respondent has failed to provide prospective buyers with ready access to written warranty information in accordance with its own policy. Furthermore, failing to maintain a binder at a location to which the consumer has been directed as a place where he can consult warranty information constitutes the failure to maintain information in a location which provides the consumer with ready access in violation of Section 702.3(a)(1) (ii).

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[36] In finding a violation, consideration has been given to respondent's utilization of methods other than the binder method to disclose written warranty information. It may be that in certain instances, respondent has used another method specified by the rule. (See for example Finding 85 on the Apache Plaza store). Ms. Sorenson's method of displaying the warranty in a plastic packet attached to the major appliance may comply with 16 C.F.R. 702.3(1)(i). But, compare the Major Appliance Department in the Evergreen Park store (Finding 74). Department manager, Orlando P. Pinelli, kept the warranties in a file drawer in the department; the warranties were not displayed).

The record shows little uniformity as to non-binder methods in use in the Major Appliance and TV/Stereo Departments in Wards' stores. Under the circumstances, evidence of this nature does not rebut a finding of violation based on respondent's failure to comply with the binder option in a number of Major Appliance and TV/Stereo Departments.

As part of its corporate policy for compliance with 16 C.F.R. 702.3(a)(1)(ii), respondent required that signs advising customers of the availability of warranty information be displayed in prominent locations within the store. The text of such signs states:

MERCHANDISE WARRANTY INFORMATION

Warranties covering merchandise sold in this store are available for inspection at the Customer Accommodation Center and the Automotive Center.

Any salesperson will direct you to these or other convenient warranty information locations. (CX 2)

Wards has chosen the CAC as a location providing the prospective buyer with ready access and has chosen to display signs representing that warranty information is available at the CAC. The failure in some stores to have binders located at the CAC in accordance with the instructions for obtaining access violates the ready access requirement of the Rule. Without adequate instructions for obtaining them, there can be no access to the binders (Discussion p. 57).

The representation on respondent's warranty signs that binders were present at the CAC were instructions for obtaining access pursuant to Section 702.3(a)(1)(ii)(B). When the binders were not present at the CAC, as represented on the sign, the instructions were inaccurate and thus, violated this part of the Pre-Sale Rule. [60]

B. The representations made by Montgomery-Ward's salesmen about the availability of warranty information.

Wards, through its signs, represented to the prospective buyer that "any salesperson will direct you to these and other convenient warranty information locations" (CX 2). With that statement, respondent directed the consumer to look to sales personnel for "instructions for obtaining access" to warranty information. 16 C.F.R. 702.3(1)(ii)(B). The FTC surveys show that some salespersons were not aware of the binder system and that some salespersons did not provide prospective buyers with instructions for obtaining access to written warranty information when such information was requested (Finding 101; Danielson 642–43, 676; Hollon 492, 506, 510–11, 542–43, 560, 565–66, 572, 580; Shallcross 893, 899). The Commission survey is corroborated on this point by certain of Wards' audit reports (CX 71(b), 73(b), 75(b), 76(b), 78(b)).

To the extent that sales personnel were unable to or did not inform prospective buyers of the availability of warranty binders after they were represented to be a source for such information, Wards violated

the provision of Section 702.3 which requires the seller to provide the consumer with instructions for obtaining access. By failing to provide prospective buyers with instruction for obtaining access, Wards also violated the provision of the rule which requires that the binders be placed "in a location which provides the prospective buyer with ready access." Ready access depends upon the consumer being adequately and accurately informed of the existence and location of the warranty information pursuant to Section 702.3(a)(1)(ii)(B).

C. The survey of Respondent's stores shows that they failed to display signs and binders.

The Commission surveyed approximately twenty (20) of respondent's retail stores. The survey disclosed that respondent failed to display signs advising consumers of the availability of written warranty information in the Major Appliance Department of fifteen (15) of the stores surveyed (Finding 94). Nor, were there signs in the TV/Stereo Department of sixteen (16) of the stores surveyed (Finding 96). The FTC investigators were not alone in noting the absence of warranty signs. The survey findings are corroborated by the results of respondent's own field audit reports which found signs were not present in certain stores in the appliance department and other locations required by respondent's instructions (CX 59B, 61B, 62B, 67B, 74B, 75B, 76B, 77B).

In a large multi-department store where there is neither a warranty binder nor a sign displayed in a department in which [61] warranted goods are sold, there is no notice in sufficient proximity to the point of sale so as to be reasonably calculated to elicit the prospective buyer's attention prior to sale.[37]

Therefore, Wards' failure to display either warranty binders or signs at or near the point of sale violated the requirement that binders or signs be placed in a manner reasonably calculated to elicit the prospective buyer's attention prior to sale (See Discussion pp. 56–58).

D. Binders were not present on every sales floor in some of Wards' stores.

A number of Wards' stores are multi-level retail operations. The Commission's survey showed that in at least two of those stores, St.

[37] The order herein requires Wards to place signs advising of the availability of warranty information on all cash registers. While a cash register may serve several departments in a Montgomery Ward store, for all practical purposes, the consumer will receive notice prior to leaving the vicinity of the department. Certainly with a sign on the cash register the customer will receive notice of the availability of warranty information prior to consummating the sale as required by the Rule.

Paul, Minnesota and Evergreen Park, Illinois, there was not a binder on every floor (Findings 76, 86).

The Rule requires that binders be placed in each department or in a location which provides the consumer with ready access. In order to comply with the ready access requirement of the Rule, the seller must, at a minimum, maintain a warranty binder on every sales floor (Discussion p. 55). Wards failed to provide the consumer with a warranty binder on every sales floor in each of its retail stores. The absence of such binders on every floor violates the ready access requirement of 16 C.F.R. 702.3(a)(1)(ii) (1975).

E. Credibility of Commission witnesses.

With respect to the stores surveyed by the FTC, a number of conflicts in the testimony pertaining to compliance with the Pre-Sale Rule have been resolved in respondent's favor. This does not mean that all the testimony of the surveyors has been discredited nor, should it be disregarded, as respondent [62]contends. The witnesses were observed while on the stand; on the basis of that evaluation there is no justification for disregarding their testimony. Furthermore, much of the survey evidence is unrebutted and respondent's own audits corroborate the findings of the survey that some Wards' stores were not complying with the Pre-Sale Rule.

F. The Audit Reports.

Respondent's audit reports showing no exception concerning compliance with Wards' binder program in the majority of the stores audited have been considered. Essentially, they are irrelevant to the issue of violation. A showing that there was compliance in some of Wards' stores would not defeat a showing of violation in other outlets. *Basic Books Inc.* v. *F.T.C.*, 276 F.2d 718, 721 (7th Cir. 1960). In any event, the audit reports showing no exception are entitled to little weight on the substantive question of violation. No auditor conducting such surveys testified concerning the methodology used in auditing an individual store's compliance with respondent's pre-sale policy.[38]

VIII. REMEDY

Complaint counsel's proposed order would prohibit violation of the

[38] Respondent was advised at the time these documents were introduced, that they were received with reservations as to the weight which should be given them, since "there is no evidence on the basis of which findings can be made as to how thoroughly or how well, or if at all, a particular auditor looked into the pre-sale availability situation in a particular store" (Tr. 935). Respondent was given the opportunity to call two or three auditors to provide a substantive foundation for this evidence (Tr. 936). No such testimony, however, was adduced.

Pre-Sale Rule and in addition impose certain affirmative obligations. If the binder option is employed, the proposed order would require Wards to employ one of three methods of disclosure. The three alternatives may be summarized as follows:

1. Maintain not less than one permanently affixed binder in each 500 square feet of selling space displayed so that they are reasonably calculated to elicit a prospective [63]buyer's attention while examining the products offered for sale and which are accessible without the assistance of sales personnel *or*

2. Maintain a single permanently affixed binder in each department and not less than one warranty sign in each 500 square feet of selling space so that at least one such sign is reasonably calculated to elicit a prospective buyer's attention while examining products in the department *or*

3. Maintain a single, permanently affixed binder at each cash register servicing departments where the binder option is utilized and maintain no less than one warranty sign in each 500 square feet of selling space served by such cash register and placed so that at least one such sign is, reasonably calculated to elicit the customer's attention while examining products offered for sale in such department.

A ban on violation of the Pre-Sale Rule is supported by the record and will issue (See Findings 93–101). The affirmative obligations proposed in connection with the binder program will not be adopted.

Neither the wording of the regulation nor the legislative background supports a construction that the binders must be placed in a sales area when the ready access option is exercised (Discussion pp. 52–56).

The proposed order's options requiring that a sign and/or a binder be placed every 500 square feet would be unduly burdensome and of doubtful efficacy. As a practical matter every area 22.3 ft. by 22.3 ft. would require such a sign.[39] The record in this case contains little evidence concerning consumer behavior in retail stores which would necessitate or even justify such a plethora of binders. Furthermore, no finding can be made on the basis of the record that the expense of such an undertaking would be balanced by the benefit to the consumer in requiring it.[40] Such expenses, moreover, would [64] inevitably be passed on to the consumer in the form of higher prices.

The record justifies measures to ensure that notice of the

[39] The square root of 500 is 22.36.

[40] Complaint counsel at the beginning of the trial replied to a question on how many binders per square feet were necessary for ready access stating "I don't believe it can be judged in terms of square feet" (Tr. 268).

availability of warranty information be displayed in a manner designed to reasonably elicit the consumer's attention prior to purchase. This can only be done effectively if such notice is in sufficient proximity to the point of sale so that it is likely to be seen before purchase. Respondent will be required to place on each cash register at which goods within the scope of the Rule are sold a sign advising "prospective buyers of the availability of the binders, including instructions for obtaining access." Since it is generally at the cash register that sales are consummated, such a provision will reasonably ensure that consumers purchasing warranted goods are likely to become aware of the existence of warranty information and how to secure it prior to sale of the product.

Complaint counsel state that "informing consumers of a right to view a written warranty after approaching the cash register to make payment on an item is of little value because the purchasing decision has already been made" (CB 53). This argument is rejected. Both the Statute and the Rule clearly indicate that the information must be made available "prior to sale" that is before the sale is consummated. Signs on the cash register will achieve that objective. Neither the text of the Regulation or that of the Statement of Basis and Purpose support a construction that binders or signs displayed pursuant to 702.3(a)(1)(A) or (B) must be seen while the consumer examines the product. The Commission could easily have required that warranty signs or binders be displayed in "close proximity to" or in "close conjunction to" the warranted product or "at the point of sale" had it been the intention to ensure that signs or binders be visible while the customer examines the product. Such a requirement was not imposed. The failure to use these or similar terms compels the inference that the phrase "reasonably calculated to elicit the prospective buyer's attention" must be construed as meaning no more than that warranty signs are likely to be seen before the purchase is made.[41] Signs permanently affixed to cash registers meet that standard. [65]

It is true that in mid 1978 respondent began placing signs advising consumers of the availability of warranty information on cash registers in its B, C, and D lines. This procedure, however, was implemented after Wards learned of allegations by the Commission staff that it was not in compliance with the Pre-Sale Rule. Remedial measures taken after the inception of an investigation do not as a general rule vitiate the need for an order where the record

[41] In any event, even if the point in time at which a purchasing decision is made (as opposed to when the sale is consummated) were relevant, there is little or no information on this subject in the record. No conclusions as to the behavior of consumers in general can be drawn from the behavior of the one consumer witness who testified in this case.

demonstrates a law violation. *Coro Inc., et al.* v. *F.T.C.,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965).

The need for an order requiring cash register signs is underscored by the fact that on a number of occasions oral requests to Wards' sales personnel for access to warranty texts proved unavailing (Finding 101). This is precisely the mischief at which the Regulation is aimed. Warranty signs properly displayed are designed to inform the consumer of the availability of warranty information independent of verbal inquiries of sales personnel.

There is no need for provisions specifying in detail requirements with respect to the text or appearance of respondent's warranty signs. Those issues were not litigated in this proceeding. Moreover, the precise wording and appearance of such signs is best left to the compliance procedures following finality of the order issued herein. While orders should be clear as to what is required they should not be so detailed that they become needlessly cumbersome. *American Home Products Corporation d/b/a Whitehall Laboratories,* 63 F.T.C. 2227, 2228–19 (1963).[42] **[66]**

The record demonstrates a violation of the ready access provision of the Rule (Findings 30, 76, 97). At a minimum, there must be one warranty binder on every sales floor. A provision in the order spelling out where binders must be placed on a sales floor once that minimum requirement has been met is however not warranted here. The record does not permit a detailed and concrete formulation on this point which could be incorporated in an order. The prerequisite to such a determination would be more detailed evidence of consumer behavior in the store situation than is available here.

The provision in the proposed order requiring the preparation of a list of all products for which the binder system is inapplicable will not be adopted. As a practical matter, the showing of violation on the litigated record has been confined to respondent's compliance with the Pre-Sale Rule's binder option. There is no justification for imposing affirmative obligations, unconnected with the binder method, whose burden and expense cannot be assessed on the basis of this record. In the event, that respondent's compliance with the Rule falls short in implementing disclosure methods other than the binder method, the provision requiring it to cease and desist from violating the Rule would cover such violations.

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[42] As the Commission stated in *American Home:*

These are details of compliance, which respondent will have ample opportunity to resolve after the Commission's order becomes effective. For the order "is only the beginning of a 'marriage' under which the Commission is obliged to afford the respondent definitive advice as to whether proposed conduct would meet the requirements of the order." *Foremost Dairies, Inc.,* F.T.C. Docket No. 7475 (decided May 23, 1963), p. 7 [62 F.T.C. 1344, 1363]. See Section 3.26 of the Commission's Rules of Practice and Procedure; *Vanity Fair Paper Mills, Inc.* v. *F.T.C.,* 311 F.2d 480, 488 (2d Cir. 1962) [7 S.&D. 583, 592].

The proposed order would also require respondent to distribute a copy of the order "to all operating divisions of the said corporation, . . . to all present and future corporate and regional personnel, and all store managers, department managers, and all audit personnel and secure from each person a signed statement acknowledging receipt of said Order." The meaning and scope of the phrase "all present and future corporate and regional personnel" is unclear. The provision will not be adopted in the form proposed. Respondent will be required to distribute a copy of the order to all of respondent's corporate officers, all regional vice presidents, store managers and department managers. The provision as modified should ensure that compliance receives the necessary attention at the management level. [67]

Complaint counsel propose that respondent be required to institute a program of instruction at all levels of the company concerning compliance with the Act. The purpose of the Pre-Sale Rule is to ensure that access to warranty information and/or notice of such information be available independent of inquiry to sales personnel. Nevertheless, a provision requiring that respondent's sales personnel be given written instructions concerning their obligations under the Pre-Sale Rule will be adopted. Such a requirement is justified in this case because respondent's warranty signs instruct the consumer to look to Wards' sales personnel for instructions for access to binders. In addition, the responses of certain salesmen to requests for warranty information have frustrated the purpose of the warranty signs (Finding 101).

The Commission's survey evidence embraced approximately twenty of respondent's retail stores. It establishes that in 14 appliance departments and 16 TV/Stereo Departments in those stores there were neither warranty binders nor signs displayed (Finding 99). Significantly, respondents binder and sign policy as initially implemented did not provide for furnishing each retail outlet with sufficient signs or binders so that either a sign or binder could be displayed in every department selling warranted goods (Findings 35, 42). The pattern of violation is sufficient to support the imposition of an order. *Goodyear Tire & Rubber Co.* v. *F.T.C.,* 331 F.2d 394, 401 (7th Cir. 1964), *aff'd.,* 381 U.S. 357 (1965); *Hoving* v. *F.T.C.,* 290 F.2d 803, 806 (2nd Cir. 1961).

Complaint counsel request imposition of a requirement that Wards' audit reports contain an express written statement concerning the compliance of each department with all provisions of the order. Considering the nature of the violation and respondent's previous attempts to implement the Rule, there is no need for such

an intrusion on Wards' internal management procedures. To the extent that the Commission needs reports of compliance, these can be required as a normal part of the compliance procedures.

Conclusions

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondent Montgomery Ward & Co., Incorporated.

2. This proceeding is in the public interest.

3. The aforesaid acts and practices of the respondent, as herein found, constitute violations of the Magnuson-Moss Warranty Act and the Pre-Sale Rule duly promulgated thereunder. Accordingly, pursuant to Section 110(b) of the Act, they [68]constitute violations of Section 5 of the Federal Trade Commission Act.

Order

I.

It is ordered, That the definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 (1976), and in Rule 702 (16 C.F.R. 702.1 (1979)) promulgated thereunder shall apply to the terms in this order.

II.

It is further ordered, That Respondent Montgomery Ward & Co., Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly through any corporation, subsidiary, division or any other device in connection with its business as a seller of consumer products distributed in commerce as "seller" and "consumer product" are defined in Rule 702 (16 C.F.R. 702.1) of the Magnuson-Moss Warranty Act (15 U.S.C. 2301) do forthwith cease and desist from:

Failing, in the course of its business as a seller of consumer products, to make the terms of written warranties on consumer products actually costing more than $15.00 and manufactured on or after January 1, 1977, available to the consumer prior to sale through utilization of one or more means specified in 16 C.F.R. 702.3(a)(1).

It is further ordered, That if respondent uses a binder system to comply with the seller's duties under 16 C.F.R. 702.3(a)(1), then respondent shall permanently affix to each cash register servicing a department where consumer products within the scope of Section 702.3(a)(1) are sold, signs, reasonably calculated to elicit the prospec-

tive buyers attention, to advise prospective buyers of the availability of warranty binders including instructions for obtaining access to such binders.

It is further ordered, That respondent shall:

1. Distribute a copy of this Order to all officers of the corporation, all regional vice presidents, store managers, and department managers in its retail stores and secure a signed statement acknowledging receipt of this order from each such person.

2. Instruct, in writing, all present and future salespersons, store managers and other [69]representatives engaged in the direct sale of consumer products to consumers on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act the Pre-Sale Rule 16 C.F.R. 702.3(a)(1) and, 15 U.S.C. 2301 *et seq.* this order, and secure a signed statement acknowledging receipt of such written instructions from each such person.

3. Maintain, for a period of three (3) years from the effective date of this Order, complete business records to be furnished upon request to any duly authorized representative of the Federal Trade Commission, relative to the manner and form of Respondent's continuing compliance with the terms and provisions of this Order.

4. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

5. Within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

Appendix of Abbreviations

CB – Complaint Counsel's Brief
CPF – Complaint Counsel's Proposed Findings
CRB – Complaint Counsel's Reply Brief
CX – Complaint Counsel's Exhibit
RA – Respondent's Admissions
RB – Respondent's Brief
RPF – Respondent's Proposed Findings
RRB – Respondent's Reply Brief
RX – Respondent's Exhibit

Opinion of the Commission

By Pitofsky, *Commissioner:*

This is the first fully litigated case to reach the Commission involving the Pre-Sale Availability Rule (16 C.F.R. 702.3), promulgated under the Magnuson-Moss Warranty Act (15 U.S.C. 2301 *et seq.*). Respondent Montgomery Ward & Co. ("Ward") was charged by a complaint issued on September 14, 1978 with failing to make consumer product warranties available to prospective purchasers of its products according to the terms of the rule. The Administrative Law Judge ("ALJ") found that Ward had violated the rule, and entered an order in accordance with his findings. Ward appeals from the finding of a violation, and complaint counsel appeal from the ALJ's failure to enter a more comprehensive order. For the reasons set out in this opinion, we affirm the finding of a violation, but modify the ALJ's order.

Although we are entering an order against Ward, the Commission is aware that questions have been raised about the benefits to consumers provided by the Pre-Sale Availability Rule in its present form. In response to a petition for repeal or modification of the Pre-Sale rule, the Commission recently undertook to reexamine the effects of the rule and to gather more information about consumers' and retailers' experiences under the rule.* When this information is [2]received, the Commission will examine the practicality of alterna-

* Letter of March 3, 1981 to Endicott Peabody, Esq., counsel for the National Mass Retailing Institute.

tive approaches to pre-sale availability of warranty information, and will consider whether to commence a proceeding to amend the Pre-Sale rule.

We have kept these concerns in mind in deciding this case, and our order has been drafted accordingly. Although our review of the Pre-Sale rule may ultimately lead us to modify its terms, we believe it would be improper to make a decision about modification until we have completed a full examination of its costs and benefits. Further, we cannot ignore the record before us in this case. The rule is still in place, and we believe that respondent's violations should be corrected.

We emphasize, however, that the order we are imposing applies prospectively only. Respondent is thus not penalized for its past violations, but merely directed to comply with the rule, as defined by this opinion, in the future. The requirements of the rule have been substantially relaxed compared to standards sought by complaint counsel and imposed by the Administrative Law Judge. Moreover, the order will be subject to modification should the obligations of retailers under the Pre-Sale rule be revised at a later date.

I. Respondent's Warranty Availability Program

Ward operates a chain of retail department stores and catalog outlets. Its approximately 650 retail stores carry both hard and soft goods. Most products are sold under Ward's private label. (I.D.F. 2, 4, 5, 9.)[1]

Montgomery Ward stores vary in size and number of floors. A store can be anywhere from 1,720 to 220,297 square feet and can have from one to four selling floors. The layout of each store (with regard to location of the merchandise) varies from store to store. Most retail stores have 55 departments selling four categories of merchandise: soft goods, furnishings, heavy line merchandise, [3]and major appliances. In most of these departments, only a small number of products are covered by written warranties. Two departments, however, the TV/Stereo department and the Major Appliance

[1] The following abbreviations are used herein.

I.D.F.	–	Initial Decision Finding of Fact
I.D.	–	Initial Decision
Tr.	–	Transcript of Testimony
CX	–	Complaint Counsel's Exhibit
RX	–	Respondent's Exhibit
CAB	–	Complaint Counsel's Appeal Brief
C. Ans. B.	–	Complaint Counsel's Answering Brief
RAB	–	Respondent's Appeal Brief
SBP	–	Statement of Basis and Purpose

department, sell almost exclusively products that are covered by warranties. (I.D.F. 11, 16, 17, 21, 22.)

In order to implement its obligations to make warranty information available to its customers, Ward instituted a system of binders and signs in accordance with one of the options of the Pre-Sale Availability Rule.[2] Under the program, Ward chose not to provide a binder or sign for every department that carried warranted goods;[3] instead, Ward supplied its stores with binders and signs to be placed in specified areas within each store. Binders were to be available at the Customer Accomodation Center (CAC),[4] in the Automotive Center (usually a detached building), and in a central location (at the discretion of the store manager) on each floor of a multilevel store. (CX 10.) The signs advertising the availability of the binders were to be placed in "prominent areas", including the appliance department, the main entrance and the escalator/elevator area. One sign was also to be placed near each binder. (I.D.F. 35, 39.)

In 1977 investigators from several of the Commission's Regional Offices conducted a survey of 19 Ward stores in order to check respondent's compliance with the Pre-Sale Availability Rule. (I.D.F. 73.) The results of the survey led to the issuance of the complaint and became the focus of this litigation.

II. The Pre-Sale Availability Rule

The Magnuson-Moss Act provides that the "Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer . . . prior to the sale of the product . . . ." 15 U.S.C. 2303(b)(1)(A). Pursuant to the provision, the Commission promulgated the Pre-Sale Availability Rule. The rule, which went into effect on December 31, 1976, sets out four alternative methods by which retailers may make warranties available to consumers. The seller may display [4]the text of the warranty "in close conjunction to each warranted product" (16 C.F.R. 702.3(a)(1)(i); make binders containing copies of warranties available to consumers (16 C.F.R. 702.3(a)(1)(ii)); display the text of the warranty on the package of the product (16 C.F.R. 702.3(a)(1)(iii)); or place a notice with the text of the warranty "in

[2] The binders contain copies of warranties offered on the products sold, and the signs direct customers to the location of the binders.

[3] Approximately 35 departments sell products for which warranties are available in the binders. (I.D.F. 35.)

[4] The CAC is the customer service department in Ward's stores. Customers frequent the CAC for information and assistance. (I.D.F. 16.)

close proximity to the warranted consumer product" (16 C.F.R. 702.3(a)(1)(iv).[5] The second alternative, the binder method, was chosen by respondent. [5]

The binder option is the most complicated alternative offered by the rule. It requires that a retailer maintain a binder or series of binders containing copies of all warranties offered on products sold. The binders must be kept in each department in which warranted products are sold, or "in a location which provides the prospective buyer with *ready access* to such binder(s)." (16 C.F.R. 702.3(a)(1)(ii) (emphasis added).) In addition, the retailer must inform consumers of the availability of the binders, by either of two methods. The binders themselves may be displayed, or signs advertising the existence of the binders may be posted, in a manner "reasonably calculated to elicit the prospective buyer's attention." *Id.* Thus, the issue presented by this case is whether Ward provided prospective purchasers with "ready access" to warranty binders, and displayed the binders or signs in a manner "reasonably calculated to elicit the prospective buyer's attention."

A

At the outset, we acknowledge that the rule's requirements, if read literally, could be subject to more than one interpretation. Ward certainly did not set out to exploit consumers, nor did it completely ignore its obligations under the rule. Nevertheless, we find that

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[5] The full text of the relevant portions of the rule is as follows:

§702.3 *Pre-sale availability of written warranty terms*

The following requirements apply to consumer products actually costing the consumer more than $15.00:

(a) *Duties of the seller.* Except as provided in paragraphs (c)-(d) of this section, the seller of a consumer product with a written warranty shall:

(1) make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

(i) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such department, or in a location which provides the prospective buyer with ready access to such binder(s) and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product of warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced into the store or department by substituting superseding warranties and by adding new warranties as appropriate. The seller shall either:

(A) display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

(B) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or

(iii) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

(iv) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies . . . .

under a fair reading of the rule and its history, Ward's procedures fell short of adequate compliance.

The following discussion contains our conclusions as to the proper interpretation, as applied to a large retail outlet such as Ward, of the binder option of the Pre-Sale Availability Rule. Because the rule is phrased in broad, general terms, we intend by this opinion to give more content to those terms, and to give further guidance to Ward and to [6]those retailers whose operations are similar to Ward's. To aid us in our interpretation, and to demonstrate that respondent should have been aware that its program was not in compliance with the rule, we have analyzed the rule's "legislative history." We will, therefore, first discuss Ward's contention that we may not use the rule's Statement of Basis and Purpose[6] as an interpretive aid.

B

Respondent argues that because the language of the Pre-Sale rule is clear and unambiguous, we may not examine extrinsic evidence to interpret its terms, under the "plain meaning rule" of statutory construction. Ward asserts that the key terminology of the rule, the terms "ready access" and "reasonably calculated to elicit the prospective buyer's attention", are sufficiently clear that the Commission need not, and indeed may not, resort to an examination of the rule's Statement of Basis and Purpose, nor the context of the provision within the rule as a whole, in order to interpret the obligations imposed by the binder option. (RAB 3–1.)[7]

Ward goes to great lengths to demonstrate that the words of the rule are unambiguous, citing a large number of wholly irrelevant cases. (RAB 9, n. 6.) In spite of these efforts, Ward succeeds in uncovering six different judicially recognized meanings for the phrase "ready access".[8] It seems to us, therefore, that the term is not so clear as to preclude the use of the rule's Statement of Basis and Purpose [7]to determine the appropriate application of the rule to respondent.[9] Moreover, as the Supreme Court has said, "'[W]hen aid

[6] 40 Fed. Reg. 60182 (1975).

[7] We agree with respondent that the plain meaning doctrine is applicable to the interpretation of agency regulations to the same extent as it is to statutory construction. *See, e.g., New York State Comm'n on Cable Television* v. *FCC*, 571 F.2d 95 (2d Cir.), *cert. denied*, 439 U.S. 820 (1978).

[8] For example, *Bache & Co., Inc.* v. *Roland*, 375 F.Supp 989 (S.D.N.Y. 1974) involved "ready access" to state courts; *Lincoln American Corp. Victory Life Ins. Co.*, 375 F. Supp. 112 (D. Kan. 1974) referred to "ready access" to corporate records; and *McKieLighter Co.* v. *City of Boston*, 335 F. Supp. 663 (D. Mass. 1971) concerned "ready access" to boat moorings. *Bache* and *Lincoln American* both defined ready access in terms of a lack of legal impediment to certain actions. None of the cases cited is relevant to a determination about convenience to consumers.

[9] This by no means suggests, of course, that the rule's language is so ambiguous as to prevent retailers from applying its provisions to their operations. We are only saying that its meaning is not so clear on its face that the Statement of Basis and Purpose would not assist in determining its applicability to respondent's stores.

to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'.'" *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States* v. *American Trucking Association,* 310 U.S. 534, 543–44 (1940)).[10]

Words and phrases less ambiguous than "ready access" or "reasonably calculated to elicit attention" have been held to require an examination of the legislative history of a statute to determine their meaning in a particular context. For example, the words "employee",[11] "pollution",[12] and "size and weight"[13] have been found not to have a plain meaning. Words and phrases similar to "ready access" have also been considered ambiguous enough to require further scrutiny of legislative intent.[14] In this case it would be foolish to seek only a literal meaning of the phrase when we are fortunate enough to have the Statement of Basis and Purpose of the rule as an interpretive aid, and where the binder option is one of four related methods provided by the rule for giving access to warranty information. [8]

Mere incantation of the plain meaning rule, without placing the language to be construed in its proper framework, cannot substitute for meaningful analysis. For we must remember Judge Learned Hand's stricture that "[t]here is no surer way to misread any document than to read it literally . . . ." [*New York State Commission on Cable Television* v. *FCC,* 571 F.2d 95, 98 (2d Cir.), *cert. denied,* 439 U.S. 820 (1978) (citations omitted).]

C

Ward asserts that under the Pre-Sale rule binders containing warranty information need only be "accessible or attainable" (RAB 7) in one location in a store (RAB 8), and that ready access is to be construed as allowing consumers to obtain warranty information with only a "reasonable delay or effort" (RAB 8–9). Ward's practice is in line with this interpretation; in many of its stores it made only one warranty binder available—usually in the CAC.[15] Complaint counsel, on the other hand, argue that the binders must be placed in

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[10] *See generally* Murphy, *Old Maxims Never Die: The Plain Meaning Rule and Statutory Interpretation in the "Modern" Federal Courts,* 75 Columbia L.Rev. 1299 (1975).

[11] *United States* v. *American Trucking Ass'n,* 310 U.S. 534, 545 (1940); *Marriott In-Flite Serv.* v. *Local 504, Air Transport Div.*, 557 F.2d 295, 298 (2d Cir. 1977).

[12] *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

[13] *Maurer* v. *Hamilton,* 309 U.S. 598, 617 (1940).

[14] In *Curlott* v. *Hampton,* 438 F. Supp. 505, (D. Alas. 1977), *rev'd in part on other grounds,* 598 F.2d 1175 (9th Cir. 1979), the words "are furnished" were interpreted to mean "have access to". *See also Cape Fox Corp.* v. *United States,* 456 F. Supp. 784, 805 (D. Alas. 1978 ("immediately").

[15] *See* discussion of placement of warranty binders, *infra.*

"reasonably close proximity" to all warranted products, in as many locations as necessary to achieve such proximity. (C. Ans. B. 14). As for the signs, according to Ward the rule's language "reasonably calculated to elicit . . . attention" is applicable only to a sign's physical attributes, not to its placement in the store. (RAB 10.) Complaint counsel counter that the display of signs as well as their physical attributes is governed by the rule. (C. Ans. B. 14.)

After an examination of the Statement of Basis and Purpose and an analysis of the binder option in the context of the other options of the rule, we find that Ward's interpretation of its obligations under the rule cannot stand.

Binders

As with other rules, the Statement of Basis and Purpose provides an analysis of the factors considered by the Commission in promulgating a rule, and is thus a useful aid in understanding the rule. Here, the Statement of Basis and Purpose reveals both the purpose of the warranty statute and of the Pre-Sale Availability Rule. The Commission was required by Congress to promulgate a rule that would permit the consumer to use product warranties "as a tool for making product comparisons". (SBP 60182).[16] As originally proposed by the Commission, the Pre-Sale rule would have [9]required a warranty binder to be placed in every department in which warranted products were sold. In response to comments on the rule, however, the Commission changed the wording of the rule in order to provide more flexibility for the retailer. (SBP 60183.) At the same time, the Commission recognized that a binder in an inconvenient location might discourage the use of the information. (*See* SBP 60183 n. 194.)

It is evident from the Statement of Basis and Purpose that the requirement that binders be located in every department was altered at the request of those retailers whose stores were small enough so that binders in every "department" would be unnecessary. The Commission explained, quoting one of the written submissions in the rulemaking record, that:

"[W]hile the provision that the binders be kept on a departmental basis is reasonable in the case of large retail outlets where it would be a burden on the customer to require that he or she go to one specific location in the store to find the binders, there are many small retail outlets which may have merchandise laid out by department, yet are small enough so that one complete set at a single location in the store would suffice." [SBP 60184.]

[16] The page numbers of the Statement of Basis and Purpose used herein are the corresponding pages of Volume 40 of the Federal Register.

The Commission went on to say that "in *such* instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold." (*Id.* (emphasis added)). Thus, the rule's flexibility was not intended to permit large retailers such as Ward to avoid the requirement that warranty information be provided in reasonable proximity to the areas where the warranted products were sold.[17]

Of course, the rule applies uniformly to all retailers, large and small, and Ward is entitled to take advantage of the clause that permits binders to be placed either in a department or in a location that provides ready access. If a large retailer such as Ward does avail itself of the alternative, however, the locations it chooses for the binders must not deprive the consumer of ready access to warranty information. [10]

The meaning of the binder option of the Pre-Sale rule becomes clearer when the other options are examined. These provisions are much more restrictive than the interpretation of the binder option that Ward advances. One method, for example, requires that warranty information actually be displayed on the package of the product. (16 C.F.R. 702.3(a)(1)(iii).) The other two options require display of the text of the warranty "in close conjunction to each warranted product" (16 C.F.R. 702.3(a)(1)(i)) and placement of a notice with the text of the warranty "in close proximity to the warranted consumer product" and "in a manner which clearly identifies . . . the product to which the notice applies" (16 C.F.R. 702.3(a)(1)(iv)). In light of the obvious intent of these other provisions to provide warranty information at or near the point of sale of warranted products, it would be incongruous to read the binder option, as Ward would have us read it, to require only one binder to be placed in a large multilevel retail establishment.

Respondent argues that it is impermissible for the Commission to make a judgment about ready access in the absence of specific evidence in the record as to how consumers behave when making purchasing decisions in retail stores. Commission "expertise" on consumer behavior, Ward asserts, is limited to judging consumer perceptions of advertising, and may not be brought to bear in other situations. (RAB 49–51.)

Although we reject the argument that our expertise is so limited,[18]

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[17] Respondent's reliance on the fact that the rule is phrased in terms of "a" location (RAB 8) is misplaced. Such a narrow reading of the rule would deny all consumers ready access to warranty information by permitting retailers to choose a single location in a large store without regard to the number of selling floors, the size of the floors or other similar considerations. This is obviously not what the Commission intended when the rule was promulgated.

[18] *See Brite Manufacturing Co.* v. *FTC*, 347 F.2d 477, 478 (D.C. Cir. 1965); *S.S.S. Co.*, 73 F.T.C. 1058, 1087 (1967); *Montgomery Ward & Co.*, 70 F.T.C. 52, 71–72 (1966), *aff'd*, 379 F.2d 666 (7th Cir. 1967).

we need not address that issue here. The Commission has already made a judgment about consumer behavior in the course of promulgating the Pre-Sale Availability Rule, and has determined that the convenience of the consumer is an important aspect of warranty availability.

In the Statement of Basis and Purpose the Commission recognized the burden on consumers that would be created if warranty binders were kept in only one location in large retail outlets. (SBP 60184.) This judgment was based on the great quantities of information about many aspects of retailing with which the Commission was furnished during the rulemaking proceeding—including information about consumer purchasing behavior. (*See, e.g.,* SBP 60183 n. 194.) [11]

As discussed above, the Statement of Basis and Purpose reveals that the concept of ready access represents a compromise, based on the rulemaking record, between the retailer's convenience and the consumer's convenience. As originally proposed, the Pre-Sale rule called for a binder in each department as the only method of compliance.[19] The binder requirement was modified and the other options were added to the rule, in response to "the retailers' cry for greater flexibility." (SBP 60183.) In place of the requirement that a binder be maintained in each department, based on its knowledge of consumer behavior, the Commission introduced the concept of ready access into the rule.

A determination as to whether ready access has been provided is a practical, commonsense judgment about reasonable convenience to consumers, based on knowledge gained from the rulemaking proceeding, and common experience.[20] The only question we need resolve here is whether consumers had ready access to warranty information in Ward's stores. This is a judgment that Congress intended us to make when it enacted the Magnuson-Moss Warranty Act, and it is one that we can make on the basis of the record in this case.

Of course, what is ready access in one store will not necessarily be ready access in another. The layout of a particular store may provide more ease of access to certain areas than to others. There may be areas within each store which are frequented more often than others by consumers. Some stores may have most warranted products

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[19] The original proposal required the retailer to:

> maintain a binder or a series of binders in each department in which any consumer product with a written warranty is offered for sale, containing copies of the warranties for the products sold in such department. [SBP 60183.]

[20] No special expertise is needed to determine that consumers will not travel all over a store to find warranty information. "In reaching their decisions neither courts nor administrative bodies should ignore the realities of life and disregard common knowledge . . . ." *Continental Can Co.* v. *United States,* 272 F.2d 312, 315 (2d Cir. 1959).

grouped in one location; others, like Ward, may have those products spread throughout the store. It is therefore difficult to generalize about appropriate locations for warranty binders. We do have information in the record before us, however, about the nature and layout of Ward's retail establishments. (I.D.F. 1–23; *see, e.g.,* CX 50–55), and the Commission can determine which locations are readily accessible to consumers. [12]

Accordingly, we have determined that consumers are unlikely to travel to other floors of a multi-level establishment in order to obtain access to warranty information. All other information necessary for the purchasing decision, (*e.g.,* price, sizes and colors available, instruction booklets) is available where the merchandise is displayed, and the place where the goods are purchased (the cash register) is in the same area. Therefore, a minimum of one binder per selling floor is necessary for most large retail establishments like Ward to provide consumers with sufficient access to warranty information.[21]

Signs

The requirement that signs be posted to advertise the availability of the binders is an integral part of the binder option of the Pre-Sale rule. No signs need be posted if the binders themselves are displayed in such a manner as to "elicit the prospective buyer's attention." (16 C.F.R. 702.3(a)(1)(iii)(A).) If the retailer chooses not to display the binders, however, the customer must be informed of the availability of warranty information through other means. As the Commission stated at the time of promulgation, "a prominent notice or series of notices must alert the prospective buyer's attention to the existence of the binders and the means for obtaining access to them". (SBP 60184.) It is reasonable to infer from this statement that the phrase "reasonably calculated to elicit the prospective buyer's attention" was intended to refer not only to the physical attributes of the signs, as contended by respondents, but to their ability to inform consumers of the availability of warranty information.

As with the placement of the binders, the placement of the signs so as to elicit consumers' attention will vary with the particular retail establishment.[22] Unless the signs alert prospective purchasers to the existence of the binders, however, the rule has served no purpose. If

[21] We note that Ward's own policy, as opposed to what it actually did, was to provide one warranty binder on each selling floor of its stores. (I.D.F. 36; CX 10.)

[22] Although we hold that the language of the rule refers both to physical attributes and location of the signs, we will discuss only the placement of the signs in this opinion. The requirements of the rule as to physical attributes were not litigated below. (I.D. 65.)

the only signs advertising the availability of warranty information are at a distance from the location in which the products are sold, the consumer is unlikely to remember when comparing [13]products that the information is available. Thus, in order for effective notice to be given of the availability and location of the information, the signs must be placed in or near the areas in which warranted products are sold, and must be unobstructed so as to be capable of being read at some distance.

III. Ward's Violations of the Rule

For the purpose of assessing Ward's liability under the Pre-Sale Availability Rule, we have judged violations against a minimum standard of compliance, based on the record of this proceeding. We have determined that stores that were found to have fewer than one binder per selling floor and stores that had no signs in or near those departments where a substantial number of warranted products are sold, are in violation of the Pre-Sale rule.

A

Binders

The record demonstrates that many large retail stores had more selling floors than binders—thus there were some floors in those stores with no binders available. The record shows sufficient instances where warranty information was not readily available to prospective purchasers to subject Ward to liability for violations of the Pre-Sale Availability Rule.[23]

The documentary evidence introduced by complaint counsel provides a basis for our finding of liability. This evidence consists of a chart of the number of binders and their locations in each store, compiled by complaint counsel from [14]information supplied by Ward (CX 46); blueprints of six Montgomery Ward stores, submitted by Ward (CX 50–55); and Ward's internal audit reports (CX 57–59).[24]

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[23] Many of Ward's stores also had no warranty binder in the CAC, the area respondent's witnesses testified that customers were likely to seek out when in search of warranty information (Pagliaro, Tr. 1027), and the area in which stores were instructed to place binders. (CX 10.)

[24] In addition to the documentary evidence in the record, complaint counsel called several witnesses to testify about the availability of warranty information. These witnesses had conducted a survey of respondent's stores, looking for warranty information, and had testified as to its unavailability. (I.D.F. 73–92.) In particular, at least nine of 12 stores visited by surveyor Jennifer Hollon had no warranty binder in or around either the Major Appliance department or the TV/Stereo department. (Hollon, Tr. 497–500, 503, 505, 542, 544, 555, 557, 559, 561, 564, 567, 570, 572, 583–84.) Since virtually all the products these departments sell are covered by written warranties (I.D.F. 21), in contrast to most other departments which sell only a few warranted products (I.D.F. 22), the failure to provide warranty information in close proximity to these departments made it unlikely that consumers would have pre-sale warranty information when it would be most likely to be influential.

In response to respondent's argument that the survey evidence is not reliable (RAB 23–32), we note that the

(Continued)

The most conclusive documentary evidence in the record regarding the location of the binders in Ward's stores is CX 46, a chart prepared by complaint counsel. The chart was compiled from information submitted by respondent, and its admissibility and accuracy were stipulated, with certain exceptions not relevant to the issue of the location of binders.[25] The chart indicates that 53 Montgomery Ward stores had at least one selling floor without a warranty binder. This figure shows substantial noncompliance with the rule at the time the chart was drawn up.

The evidence of CX 46 is corroborated in part by the blueprints of six stores that were introduced into evidence. (We assume that these blueprints are representative examples of the floor plans of Ward's stores; respondent has made no attempt to convince us otherwise.) They show that in the North Riverside and Penn Square stores, for example, there was no binder on the first floor. (CX 50 and 52.) In addition, we note that the blueprints demonstrate the distances consumers must travel to find the warranty binders. [15]

In several cases, the blueprints show that a customer at one end of a selling floor must cover a distance at least the size of a football field in order to obtain access to warranty information.[26]

Ward's audit reports are documents prepared by internal auditors according to a program established by the company. (I.D.F. 56, 60.) In November 1976, compliance with Ward's warranty availability program was added to the list of matters to be audited. (I.D.F. 66.) The audit reports record any deficiencies found by the auditor, *i.e.*, the failure to place a binder or a sign in the location required by Ward's policy. (I.D.F. 54.) The reports in the record corroborate some of the other evidence and confirm that at least on some occasions violations of the Pre-Sale Availability Rule occurred.

Respondent argues that it was inappropriate for the ALJ to rely on the audit reports as evidence of violations of the rule, because "the audit procedures assure that such deficiencies are corrected immediately". (RAB 33.) We need not resolve the issue of whether it is proper for us to rely on the audit reports, however, since we need not use them as independent evidence. Consequently, we merely note that the reports confirm some of the other evidence in the record.

ALJ found the survey evidence to be credible (I.D. 61–62), and we are not persuaded that his finding should be disturbed. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951). Indeed, much of the testimony was corroborated by the documentary evidence introduced in this case. *Compare Hollon*, Tr. 497, 500 *with* CX 50; Hollon, Tr. 555, 557 *with* CX 46BB.

[25] Tr. 174–180.

[26] *E.g.*, CX 54 (312 feet); CX 55 (360 feet).

Signs

The survey taken by complaint counsel's investigators turned up ample evidence that respondent's stores did not have a sufficient number of signs "reasonably calculated to elicit the prospective buyer's attention."[27] According to the surveyors, there were no warranty signs in the CAC in six of the stores surveyed. (I.D.F. 98.) Since the CAC is the place chosen by Ward for making binders available, and since (as we noted earlier) it considers the CAC the place that customers are most likely to go for such information (Pagliaro, Tr. 1027), it would seem that posting a sign in the CAC would be crucial to maintenance of an effective warranty information program.[28] **[16]**

The survey also demonstrated that many stores had no signs advising customers of the availability of warranty information in the two departments where consumers were most likely to wish to make use of such information: the TV/Stereo department and the Major Appliance department. Seventeen of the stores surveyed had no sign in the TV/Stereo department (I.D.F. 96) and 14 had no sign in the Major Appliance department (I.D.F. 94). Moreover, in many of the stores, no signs alerting consumers to the existence of the warranty binders were visible at the entrance used by the surveyors or in the aisles on the way to the TV/Stereo and Major Appliance departments. (*See, e.g.,* Hollon, Tr. 485, 497, 503, 548, 562, 570, 584.) We note that Ward's policy was to have signs posted in the Major Appliance Department. (I.D.F. 39; CX 10.)

Although respondent's failure to have a sign in each one of these locations at any given moment in time would not necessarily violate the Pre-Sale Availability Rule, the aggregate evidence shows that in many stores signs were not clearly visible. The very fact that in so many stores the surveyors did not notice signs in most of the locations they visited is indicative of the manner in which Ward complied with the requirements of the rule. Those individuals entered the stores looking for warranty signs; if they spotted none, how were ordinary consumers to do so?

The ALJ also found that the failure of some of Ward's salespeople, when asked, to direct consumers to the location of warranty information and to inform them of the availability of the binders violated the Pre-Sale rule. (I.D.F. 105.) Commission investigators testified that several salespeople informed them, when they asked

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[27] The documentary evidence in the record is inconclusive as to the presence or absence of signs in appropriate places in respondent's stores.

[28] If the binder is not displayed, and if no sign is posted, a customer could conclude that warranty information is not in fact available. *See* SBP 60184 n. 208 (comment of Montgomery Ward).

about warranty information, that the warranty would be available after purchase of the product. (I.D.F. 101; *see, e.g.,* Hollon 506, 510–11; Danielson 643–44, 676.) We disagree with the ALJ that this lapse on the part of the sales force is a separate violation of the rule, but it does show a failure by respondent to educate its salespeople as to their responsibility to make warranty information available.

In sum, the record demonstrates numerous violations of the Pre-Sale rule under any reasonable interpretation of that rule. The survey done by the Commission investigators shows an absence of warranty availability in the areas of the store where consumers are most likely to benefit from warranty information. The documentary evidence reveals that [17]over 50 stores did not have at least one binder placed on every floor. We therefore find that the binder requirement of the rule was violated in those stores where there were selling floors without any binders. We also find that the lack of signs, in the aggregate, amounts to a violation of the requirement that binders or signs be placed so as to elicit the attention of consumers.

B

Respondent contends for several reasons that the Commission may not hold it liable for violations of the Pre-Sale rule. First, Ward contends that application of any interpretation of the rule in this case would be in effect an amendment to the rule, which must be done in accordance with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553. Second, Ward asserts that application of the ALJ's interpretation of the rule (and presumably the Commission's interpretation) would violate its due process rights, because Ward has had inadequate notice of its obligations, and because the rule would thus be rendered so vague as to be unconstitutional. Finally, respondent argues that "as a matter of public policy" the Commission should not have issued the complaint that initiated the adjudicative proceeding.

In response to respondent's first contention, we agree that the Commission may not, in an adjudicative proceeding, create a general obligation that was not contemplated when the rule was promulgated. *See NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969). That is quite a different matter, however, from interpreting the general terms of a rule in an adjudicative proceeding. Of necessity, any rule that is to cover such widely divergent entities as large retailers like Ward and small, one-room stores must be drafted in general terms.

Application of the Pre-Sale rule to a specific situation, therefore, must be done in an adjudication.

An administrative agency generally has a choice whether to proceed by rulemaking or by adjudication. "[T]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202–03 (1947). Agencies also have a choice, when clarifying the meaning of rules, between amending them and interpreting them in an adjudication. *See* 1 K.C. Davis, *Administrative Law Treatise* Section 5.01 at 292 (1958).[29] Moreover, a finding of liability in a Commission proceeding subjects the respondent to no fines or penalties, [18]but merely results in an order to cease and desist from past practices. Such a proceeding is particularly appropriate for an adjudicative interpretation of a general legislative rule. *NLRB* v. *Bell Aerospace Co.*, 417 U.S. 267, 295 (1974).

Respondent's second contention is equally without merit. On the one hand, Ward argues that the Pre-Sale rule is so clear on its face that the Commission may not use its Statement of Basis and Purpose to aid in its interpretation; on the other hand, Ward asserts that when the rule is interpreted to make its practices a violation, it is so vague as to violate its due process rights.

As we noted above, some vagueness is inherent in a rule of general applicability like the Pre-Sale rule. Such a rule is not overly vague if it has a "reasonable degree of certainty." *Boyce Motor Lines* v. *United States,* 342 U.S. 337, 340 (1952). Indeed, one purpose of an adjudicative proceeding to enforce a rule is to interpret the rule, and it is proper for the government to give content to a general rule through its application to a particular party in an adjudication. *Waters* v. *Peterson,* 495 F.2d 91, 99 (D.C. Cir. 1973).

Respondent's public policy argument must also be rejected. A congressional determination has been made that consumers will be well served by the availability of warranty information prior to sale. *See* 15 U.S.C. 2302(b)(1)(A). This proceeding was brought to ensure that this congressional policy was carried out. Moreover, under Section 5 of the FTC Act, 15 U.S.C. 45, it is within the Commission's discretion to determine whether a proceeding is in the public interest, and that public interest determination was made when the Commission issued the complaint in this adjudication.

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[29] A third alternative is to issue an interpretation of an existing rule, either by interpretative rule or in a policy statement. Again, the choice is within the discretion of the agency. *See* 1 K. C. Davis, *Administrative Law Treatise* Section 5.01 at 289 (1958).

IV. Relief

Having found numerous violations of the Pre-Sale Availability Rule, we have entered an order designed to ensure, to the extent possible, future compliance with the rule. *See FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1959). In the future Ward must make sure that warranty binders are readily accessible and that signs are posted to inform its customers of the existence and location of the binders. In formulating our order, we have taken into account the record evidence about the size and layout of Ward's stores and have employed our own expertise on consumer behavior (*see* Part II C, *supra*). In addition, we have considered the costs to retailers of establishing and maintaining a series of warranty binders.

Binders

The attached order requires Ward to maintain at least one warranty binder per selling floor in its retail establishments. (This would include a binder in its automotive [19]departments in stores where the department is contained in a separate building (*see* I.D.F. 14)). The order provision is based on our judgment that, given the size of many of Ward's stores, customers are unlikely to consult the binders if they must go to a different floor (*see* Part II C, *supra*). As evidenced by Ward's own policy to maintain a warranty binder on each selling floor, the order should not prove overly burdensome for Ward to implement.

Complaint counsel in their appeal brief urge the Commission to require respondent to maintain one binder in each department or sales area of each selling floor. (CAB 11–12.) It is at least possible that in some stores more than one binder per floor may be necessary to provide ready access, but we are unwilling, on this record, to impose such a burden on respondent. Although we have determined that consumers have not been provided with ready access to warranty information if that information is not on the same selling floor as the department in which the warranted product is sold, we are not persuaded that more than one binder per floor is necessary to provide ready access. Thus, we are unable to conclude that the costs of requiring more than one binder per selling floor are outweighed by the benefits to consumers.

Signs

In order to ensure that signs informing consumers of the availability of warranty information are placed in the areas where decisions

to purchase warranted products are made, the attached order requires respondent to place one sign in each department in which warranted products are sold. In our judgment, consumers are unlikely to consider asking for a warranty binder unless they are informed of its existence while they are making their purchasing decision. For this reason, the ALJ's determination that signs should be placed on cash registers is erroneous. Generally, by the time that a customer approaches the cash register, the purchasing decision has already been made.[30] The order also provides, in the interest of flexibility, that where two adjacent departments share a wall, one sign will suffice for both departments.

Finally, the order contains provisions designed to ensure respondent's compliance with the order. These include a requirement that respondent conduct semi-annual audits of its stores to make sure that the warranty signs and binders [20]are maintained in the manner required by the order. Ward will be required to be substantially more vigilant in inspecting its stores and requiring warranty information to be made available than it has been in the past.

In conclusion, we would like to make clear that the provisions of the order are tailored for Montgomery Ward, based on the evidence in the record of the proceeding. The system of compliance other retailers must follow depends on the particular organization of each store. This opinion should, however, put retailers on notice that it is insufficient to maintain one warranty binder in a large multilevel store, whether it is placed in a customer service area or elsewhere.

An appropriate order is attached.

Final Order

This matter has been heard by the Commission upon the appeal of counsel for respondent and the appeal of counsel supporting the complaint, and upon briefs and oral argument in support of and in opposition to the appeals. The Commission, for the reasons stated in the accompanying opinion, has granted the appeals in part, and denied the appeals in part. Therefore,

It is ordered, That the initial decision of the administrative law judge, pages 1–46, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except as is inconsistent with the attached opinion.

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[30] If respondent chooses to display the binders themselves rather than the signs, as permitted by the rule (16 C.F.R. 702.3(a)(1)(iii)(A)), binders must be placed in each department. If only one binder per floor is displayed and no signs are posted, that binder could not be said to be placed in a manner "reasonably calculated to elicit a prospective buyer's attention."

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following Order to Cease and Desist be entered:

ORDER

I.

It is ordered, That the definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 (1976), and in Rule 702, 16 C.F.R. 702.1, promulgated thereunder, shall apply to the terms in this order. [2]

II.

It is further ordered, That respondent Montgomery Ward & Co., Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with its business as a seller and warrantor of consumer products distributed in commerce, do forthwith cease and desist from failing, in its course of business as a seller of consumer products, to make the terms of written warranties on consumer products actually costing more than $15.00 and manufactured on or after January 1, 1977, available to the consumer prior to sale through utilization of one or more means specified in 16 C.F.R. 702.3(a)(1).

III.

It is further ordered, That for those retail establishments in which respondent chooses to use a binder system to comply with the seller's duties under 16 C.F.R. 702.3(a), respondent shall:

1. Maintain a permanently affixed binder system on each selling floor of each retail establishment; and
2. Label and display such binders, or place permanently affixed signs, in a prominent location in each department of each retail establishment where warranted products are sold, in a manner reasonably calculated to elicit the prospective buyer's attention. If two adjacent departments share a wall, one sign may be placed on that wall.

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IV.

It is further ordered, That:

1. Respondent shall, for a period of three (3) years from the effective date of this order, maintain business records which show the form and manner of respondent's continuing compliance with the terms and provisions of this Order; conduct semi-annual audits and maintain records of these audits concerning each store's continuing compliance; grant any duly authorized representative of the Federal Trade Commission access to all such business records; and furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives. [3]

2. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this Order.

3. Respondent shall within sixty (60) days after the effective date of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order and shall submit yearly reports detailing the manner and form of its compliance on the anniversary of the effective date of this Order for a period of three (3) years.

In the Matter of

SUNKIST GROWERS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9100. Complaint, May 31, 1977—Decision, May 5, 1981

This consent order requires, among other things, that Sunkist Growers, Inc. ("Sunkist"), a Sherman Oaks, Calif. processor and marketer of citrus fruit to timely divest, in accordance with the terms of the order, the assets and properties constituting the Arizona Products Division ("APD"), and offer the purchaser, annually for four years, a prescribed volume of citrus fruit for processing. Respondent is also barred from using a non-Sunkist plant to process citrus fruit packed in Yuma County, Ariz. until it has first offered the opportunity to the acquirer of APD. Additionally, the order requires respondent, for specified periods, to limit the number of its commercial packinghouse affiliations and refrain from acquiring, without prior Commission approval, any California or Arizona commercial citrus fruit processing plant or packinghouse.

Appearances

For the Commission: *David D. Laufer, L. Barry Costilo,* special trial counsel; *Bert L. Slonim, Debra L. Goldstein, Richard Kudo* and *Patricia A. Bremer.*

For the respondent: *Raymond C. Fisher, Harold J. Kwalwasser, Marlene B. Jones* and *R. Scott Jenkins, Tuttle & Taylor, Inc.,* Los Angeles, Calif.

Complaint

The Federal Trade Commission, having reason to believe that Sunkist Growers, Inc. has violated and is now violating Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and that a proceeding by it in respect thereto is in the public interest, hereby issues its complaint charging as follows:

DEFINITIONS

Paragraph 1. For the purposes of this complaint, the following definitions shall apply:

(a) *Western citrus fruit* includes oranges, lemons, grapefruit and other varieties of citrus which are grown in California and Arizona;

(b) *Fresh-grade fruit* is citrus that is sold for fresh consumption;

(c) *Product-grade fruit* is citrus that is used for processing into juice or peel products;

(d) *Citrus products* are juice or peel products made from product-grade fruit;

(e) *Packing* means services performed by packinghouses including, among others: receiving western citrus fruit, separating it into product-grade fruit and fresh-grade fruit, shipping the product-grade fruit to citrus processing plants, washing, waxing, grading and sizing fresh-grade fruit, placing it into cartons and shipping the cartons to buyers;

(f) *Processing* means receiving western product-grade fruit and manufacturing it into citrus products;

(g) *Marketing* is the sale and distribution of western citrus fruit or citrus products to wholesale buyers.

SUNKIST GROWERS, INC.

PAR. 2.

(a) Respondent Sunkist Growers, Inc. (hereinafter "Sunkist") is an incorporated cooperative association, without capital stock, organized under the laws of the State of California, with its principal office and place of business at 14130 Riverside Drive, Sherman Oaks, California;

(b) Sunkist engages in the marketing and processing of western citrus fruit packed by approximately 43 cooperative associations and 51 commercial citrus fruit packinghouses with which Sunkist has contracts and agreements;

(c) Sunkist markets fresh or in processed form approximately 75 percent of the total production of western oranges and lemons;

(d) Total sales for Sunkist were $482.9 million for the fiscal year ending October 31, 1975.

TRADE AND COMMERCE

PAR. 3.

(a) The western citrus fruit industry is composed of several levels of operation, including growing, packing, processing, and marketing;

(b) Total wholesale sales of western citrus fresh-grade fruit and

western citrus products exceeded $500 million in the 1974–75 crop year.

PAR. 4.

(a) The relevant markets include the following and any submarkets thereof:

(1) The packing of western citrus fruit in California and Arizona;
(2) The trade in product-grade western oranges in California and Arizona;
(3) The trade in product-grade lemons in California and Arizona;
(4) The manufacture, sale and distribution of lemon products in the United States and Canada;
(5) The sale and distribution of fresh-grade western oranges to wholesale buyers in the United States and Canada;
(6) The sale and distribution of fresh-grade lemons to wholesale buyers in the United States and Canada;
(7) The sale and distribution of fresh-grade western oranges for export outside of the United States and Canada;
(8) The sale and distribution of fresh-grade lemons for export outside of the United States and Canada.

(b) Sunkist controls approximately 65 percent or more of each of the relevant markets or submarkets alleged herein. No other firm accounts for more than 15 percent of any of the relevant markets or submarkets alleged herein.

JURISDICTION

PAR. 5. At all times relevant herein, Sunkist sold and shipped western citrus fruit and citrus products throughout the United States and to various foreign countries and engaged in commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and engaged in or affected commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Except to the extent that competition has been hindered, frustrated, lessened or eliminated by the acts and practices alleged in this complaint, Sunkist is in competition with other firms in the relevant markets and submarkets alleged herein.

COUNT ONE

PAR. 6. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 7.

(a) Sunkist maintains exclusive dealing contracts and agreements with approximately 51 commercial packinghouses which prohibit these packinghouses from:

(1) Packing fruit for non-Sunkist growers; and

(2) Dealing with marketers or processors which compete with Sunkist.

(b) The effects, among others, of these contracts separately or in combination with other agreements entered into by Sunkist have been or may be to foreclose competitors from a substantial share of one or more of the markets or submarkets alleged in Paragraph Four (a)(1)–(3) and (5)–(8).

PAR. 8. The aforesaid acts and practices, considered alone or in combination with the other acts and practices alleged in this complaint, have had or may have, among other things, the tendency and capacity to increase barriers to entry or to restrain, lessen or eliminate competition or create a monopoly in one or more of the markets or submarkets alleged in Paragraph Four (a)(1)–(3) and (5)–(8) and thus are to the prejudice and injury of the public and constitute unfair methods of competition or unfair acts and practices in or affecting commerce all in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT TWO

PAR. 9. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 10.

(a) In January 1966, Sunkist combined, contracted, or agreed with the Western Sales Division of Blue Goose Growers, Inc. (hereinafter "Blue Goose"). Pursuant to this combination, contract, or agreement, Blue Goose ceased marketing fresh-grade western citrus fruit and Sunkist entered exclusive dealing contracts with 13 commercial packinghouses that were owned by or under contract to Blue Goose and formerly marketed through Blue Goose;

(b) The combination, contracts, or agreements alleged above resulted in prohibiting commercial packinghouses owned by or under contract to Blue Goose from dealing with growers that are not members of Sunkist or with marketers or processors that compete with Sunkist;

(c) The effects, among others, of the combination, contracts, or

agreements described above have been or may be to eliminate substantial competition between Sunkist and Blue Goose, or increase entry barriers, or increase concentration or strengthen the position of Sunkist in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(3) and (5)–(8).

PAR. 11. The aforesaid act and practice, considered alone or in combination with the other acts and practices alleged in this complaint, has had or may have, among other things, the tendency and capacity to increase barriers to entry or to restrain, lessen or eliminate competition or create a monopoly in one or more of the markets or submarkets alleged in Paragraph Four (a)(1)–(3) and (5)–(8) and thus is to the prejudice and injury of the public and constitutes an unfair method of competition or unfair act and practice in or affecting commerce all in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT THREE

PAR. 12. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 13.

(a) In August 1974, Sunkist, which then owned two citrus processing plants, acquired the assets of Growers Citrus Products, a division of Golden Y Growers, Inc. (hereinafter "GCP"), a corporation. The assets consisted of a citrus processing plant located in Yuma, Arizona. At the same time, Sunkist also purchased land and cold storage facilities from Southwestern Ice and Cold Storage Co. (hereinafter "Southwestern"), a corporation. The land and cold storage facilities were previously leased by GCP from Southwestern for use in connection with operation of the processing plant;

(b) Prior to the acquisition, GCP was in competition with Sunkist in the markets or submarkets alleged in Paragraph Four(a)(3)–(4). In the years prior to the acquisition, Sunkist's share of the markets or submarkets alleged in Paragraph Four(a)(3)–(4), exceeded 65 percent and GCP's share was aproximately 5 percent.

(c) At all times relevant herein, GCP and Southwestern were engaged in commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. Section 12, and engaged in or affected commerce within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

(d) The effects, among others, of the acquisitions described above have been or may be to eliminate substantial competition between

Sunkist and GCP, or increase entry barriers, or increase concentration or strengthen the position of Sunkist in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8).

PAR. 14. The acquisitions by Sunkist alleged herein may substantially lessen competition or tend to create a monopoly in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8) in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT FOUR

PAR. 15. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 16. Sunkist processes approximately 75 percent of the product-grade lemons grown in the United States.

PAR. 17.

(a) Sunkist, as an instrumentality of its members, who are otherwise competitors of each other, stores and withholds from the market a large supply of lemon products for the purpose or with the effect of stabilizing the price of lemon products.

(b) The effects, among others, of the act and practice described above have been or may be to stabilize the price of lemon products, or to deter entry into lemon processing.

PAR. 18. The aforesaid act and practice, considered alone or in combination with the other acts and practices alleged in this complaint, has had or may have, among other things, the tendency and capacity to increase barriers to entry or to restrain, lessen or eliminate competition or create a monopoly in the market or one or more of the submarkets alleged in Paragraph Four (a)(4) and thus is to the prejudice and injury of the public and constitutes an unfair method of competition or unfair act and practice in or affecting commerce all in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

COUNT FIVE

PAR. 19. The allegations of Paragraphs One through Five are incorporated herein by reference.

PAR. 20. Sunkist has monopoly power in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8) above.

PAR. 21. Sunkist, individually or in combination with others, has engaged in the acts and practices alleged in Counts One through Four, above, among others.

PAR. 22. Sunkist has adopted and followed a policy of refusing to permit competing processors to purchase product-grade western oranges and lemons from cooperative associations under contract to Sunkist.

PAR. 23. Sunkist has adopted and followed a policy of refusing to permit competing marketers to purchase or market fresh-grade western oranges and lemons packed by cooperative associations under contract to Sunkist.

PAR. 24. Sunkist has adopted and followed a policy of refusing to permit western citrus fruit of non-Sunkist growers to be packed in packinghouses owned by cooperative associations under contract to Sunkist.

PAR. 25. Sunkist has adopted and followed a policy of refusing to sell product-grade or fresh-grade western oranges and lemons to competing marketers or processors.

PAR. 26. Sunkist has adopted and followed a policy of achieving and maintaining control of at least 70 percent of the total supply of western oranges and lemons packed by packinghouses in California and Arizona.

PAR. 27. The effects, among others, of the acts and practices described above, have been or may be to increase barriers to entry, or stabilize, control, hinder, lessen, foreclose, or restrain competition in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8).

PAR. 28. By engaging in the acts and practices alleged herein, Sunkist by itself or in combination with others has monopolized, attempted to monopolize, or maintained a non-competitive market structure in one or more of the relevant markets or submarkets alleged in Paragraph Four (a)(1)–(8) above in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission

having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Sunkist Growers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 14103 Riverside Drive, in the City of Sherman Oaks, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

DEFINITIONS

For the purpose of this order, the following definitions shall apply:

(a) *Sunkist* means Sunkist Growers, Inc.; its divisions and subsidiaries; its officers, directors, representatives, agents and employees acting as such; and its successors and assigns.

(b) *Affiliated packinghouse* or *packinghouse affiliated with* means a citrus packinghouse authorized by Sunkist to pack citrus for Sunkist grower-members. It does not include a packinghouse which packs citrus for Sunkist members only on a temporary, ad hoc, emergency basis.

(c) *Arizona Products Division* means (1) all facilities and assets located in Yuma, Arizona, owned by Sunkist which are used in connection with the conversion of citrus fruit into citrus products; (2) the cold storage facilities and assets, acquired by Sunkist, which

previously had been part of the Southwestern Ice and Cold Storage Company; and (3) all agricultural lands used for effluent disposal from the above-described facilities. The facilities, assets and agricultural lands listed above shall include, but are not limited to, all land, buildings, equipment, supplies and machinery used by Arizona Products Division, together with any other additions and improvements thereto.

(d) *Citrus Packinghouse* means any facility which packs lemons, navel oranges, valencia oranges, grapefruit or tangerines for fresh fruit shipment on a regular basis, but does not include a facility which packs those varieties only on an auxiliary and overflow basis.

(e) *Commercial Packinghouse* means a citrus packinghouse located in California or Arizona which is not a packinghouse owned or operated by an association of growers meeting the requirements of Section 1 of the Capper-Volstead Act, or by one or more growers packing only their own citrus fruit.

(f) *Commercial Citrus Processing Plant* means a processing plant, used or equipped to be used, in whole or in part, to process whole citrus fruit into juice, peel or oil products, which is not owned or operated by an association of growers meeting the requirements of Section 1 of the Capper-Volstead Act.

(g) *District III* means the prorate district established pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 et seq., as amended, and as specified in regulations thereunder, 7 C.F.R. 907.66(c), 908.66(c) and 910.64(c), as of the date this order becomes final.

(h) *Lemon Administrative Committee* means the Lemon Administrative Committee established pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, and regulations thereunder.

(i) *Orange Administrative Committees* means the Navel and Valencia Orange Administrative Committees established pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, and regulations thereunder.

(j) *Product-grade citrus* means citrus which is received by processing plants for processing into citrus products.

I

It is ordered, That within eighteen (18) months from the date this order becomes final, Sunkist shall divest as a unit, absolutely and in good faith, all properties and assets constituting the Arizona Products Division ("APD") of Sunkist in order to establish APD as a viable competitor in the citrus processing business. The divestiture

shall be subject to the prior approval of the Federal Trade Commission. Pending divestiture, Sunkist shall take all measures necessary to maintain APD in its present condition and prevent any deterioration, except for normal wear and tear, of any of the assets to be divested which may impair their present operating abilities or market value.

II

It is further ordered, That for each of the four (4) complete District III citrus seasons (approximately September-August) after the divestiture of APD or the four (4) years (twelve-month periods) beginning on the date of divestiture, whichever the acquirer of APD ("acquirer") shall elect, Sunkist shall offer to sell to the acquirer for processing by the acquirer a mixed supply of product-grade citrus grown in District III in the manner described below, unless otherwise modified by mutual agreement between Sunkist and the acquirer:

(a) The total volume of citrus to be offered for sale in the first three (3) seasons or years shall be determined as follows:

Sunkist's total seasonal or yearly tons of product-grade citrus from District III	Total tons Sunkist shall offer to sell to the acquirer of APD
0–100,000	45% of Sunkist's product-grade citrus from District III
100,001–150,000	45,000
150,001–170,000	50,000
170,001 and above	55,000

(b) The total volume of citrus to be offered for sale in the fourth (4th) season or year shall be one-half (½) of the amount determined in accordance with subparagraph (a) of this paragraph.

(c) The volume of such citrus shall consist of a mix of varieties grown in District III that is equal to the proportion that each such variety bears to Sunkist's total District III volume of those varieties.

(d) Sunkist's total seasonal or yearly obligation to offer to sell citrus to the acquirer shall be reduced by an amount equal to any amount of citrus the acquirer obtains in that season or year for processing at APD from any citrus packinghouse affiliated with Sunkist on the date this order becomes final and not affiliated with Sunkist at the time the citrus is obtained from the packinghouse. In calculating Sunkist's obligation to offer to sell citrus under this order, the amount of citrus purchased by the acquirer from such a

packinghouse shall be included in the total tons of Sunkist's product-grade citrus from District III computed on a yearly or seasonal basis, consistent with the acquirer's election referred to above.

(e) The amount of citrus which the acquirer agrees to buy from Sunkist shall be specified in a yearly contract. Sunkist shall make the citrus available in daily quantities of not less than 100 tons and not more than 600 tons until Sunkist has met its total requirements specified in the yearly contract. If Sunkist's District III tonnage on any day is less than 100 tons Sunkist shall make all its District III citrus tonnage available to the acquirer, and the acquirer shall give reasonable notice to Sunkist whether the acquirer will take such tonnage. The contract shall be in accord with usual and customary industry terms and conditions, including reasonable terms and conditions to assure timely removal of the citrus from Sunkist's affiliated packinghouses.

(f) To determine Sunkist's obligations in paragraphs II (a), (b) and (c) of this order, the seasonal crop projections of the Orange Administrative Committees for oranges, the Lemon Administrative Committee for lemons, and Sunkist's regular seasonal projections for grapefruit, tangerines and other varieties shall be used. If during the season or year the crop projection or the actual crop production for any season or year varies from the projections establishing Sunkist's initial requirements for that season or year, the total amount and mix of citrus that Sunkist must sell under its contract or offer to sell under this order shall be adjusted to conform to the revised projections or to actual production as appropriate.

(g) The price Sunkist shall charge the acquirer for the citrus shall be no less favorable than the price at which Sunkist makes comparable sales of that variety of product-grade citrus to any other processing customer. If Sunkist has no such sales to any other processing customer, then the price shall be the prevailing market price for comparable sales of that variety.

III

It is further ordered, That for a period of five (5) years after the divestiture of APD, if Sunkist uses a non-Sunkist processing plant to process the citrus of Sunkist growers packed in Yuma County, Arizona, it shall first offer to the acquirer the opportunity to process that citrus, provided the product will be processed to meet Sunkist's specifications and the charge for processing is commercially reasonable.

IV

It is further ordered, That for a period of ten (10) years from the date this order becomes final Sunkist shall not directly or indirectly acquire, without the prior approval of the Federal Trade Commission, any stock interest in or assets of any commercial citrus processing plant in the states of California or Arizona.

V

It is further ordered, That for a period of five (5) years from the date this order becomes final, there shall not be more than thirty-nine (39) commercial packinghouses affiliated with Sunkist unless prior approval of the Federal Trade Commission is obtained.

VI

It is further ordered, That for a period of five (5) years from the date this order becomes final, Sunkist shall not directly or indirectly acquire, without the prior approval of the Federal Trade Commission, any stock interest in or assets of any citrus packinghouse in the states of California or Arizona, except for an interest resulting from foreclosure by Sunkist, in which case Sunkist shall divest such interest in the packinghouse within one year of the foreclosure.

VII

It is further ordered, That within sixty (60) days after the date this order becomes final, and every sixty (60) days thereafter until Sunkist has fully complied with the provisions of paragraph I of this order, Sunkist shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with or has complied with that provision. All compliance reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the properties specified in paragraph I of this order and the identity of all such parties. Sunkist shall furnish to the Commission copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

On the date Sunkist divests APD and on every anniversary date of the divestiture thereafter for the following five years, Sunkist shall submit to the Commission a verified written report setting forth the

manner and form in which it is complying or has complied with paragraph II of this order.

On the first anniversary of the date this order becomes final and on every anniversary date thereafter for the following five years, Sunkist shall submit to the Commission a verified written report setting forth the manner and form in which it has complied with paragraphs III, V and VI of this order.

On the first anniversary of the date this order becomes final and on every anniversary date thereafter for the following nine (9) years, Sunkist shall submit to the Commission a verified written report setting forth the manner and form in which it has complied or is complying with paragraph IV of this order.

VIII

It is further ordered, That Sunkist notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation, including but not limited to changes in the corporate by-laws or membership contracts, which may affect compliance obligations arising out of this order.

IN THE MATTER OF

GODFREY COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3066. Complaint, May 14, 1981—Decision, May 14, 1981

This consent order requires, among other things, a Waukesha, Wis. operator of a retail grocery chain to divest within six months to a Commission-approved acquirer or acquirers, seven specified retail grocery stores located in "The Milwaukee SMSA." The company is also prohibited, for a period of ten years, from making any acquisition in the retail grocery store business involving four or more stores without prior Commission approval.

Appearances

For the Commission: *David D. Laufer, Katherine Boland* and *Paul R. Zamolo.*

For the respondent: *James T. Halverson, Thomas P. Palmer* and *Gregory S. Bentley, Shearman & Sterling,* New York City, and *Robert J. Sugrue, Boodell, Sears, Sugrue, Giambalvo & Crowley,* Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has entered into an agreement which, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) and that said agreement therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), and having found that a proceeding with respect to said violation is in the public interest, issues its Complaint stating its charges as follows:

DEFINITIONS

1. For the purposes of this Complaint, the following definitions shall apply:

(a) *Retail grocery stores* means retail food stores classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits

and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food, and non-edible grocery items. In addition, these stores often sell smoked and prepared meats, and fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats.

(b) *Godfrey* means Godfrey Company, a corporation organized under the laws of Wisconsin with its principal executive offices at 1200 West Sunset Drive, Waukesha, Wisconsin and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(c) *Milwaukee SMSA* means the Milwaukee Standard Metropolitan Statistical Area, consisting of the four Wisconsin counties of Milwaukee, Waukesha, Washington and Ozaukee.

GODFREY COMPANY

2. Respondent Godfrey Company (Godfrey) is a Wisconsin corporation with its principal executive offices at 1200 West Sunset Drive, Waukesha, Wisconsin.

3. In 1979, Godfrey was engaged in the distribution of food through a chain of 86 retail grocery stores operated under the name "Sentry." Forty-eight of the 86 Sentry grocery stores were owned and operated by Godfrey and 38 were operated by affiliated retailers pursuant to a franchise agreement with Godfrey. All 86 stores were located in the State of Wisconsin. In addition to its grocery stores and wholesale operations, Godfrey owns and operates a bakery, greenhouses, retail hardware stores, retail drug store, egg production facility, farm, and land development company.

4. Godfrey's total net sales for the year ending February 23, 1980 were approximately $368,679,000.

5. In 1979, there were 42 Sentry retail grocery stores in the Milwaukee, Wisconsin SMSA of which 28 were corporately owned and 14 were franchised.

6. At all times relevant herein, Godfrey has engaged in activities in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and Section 4 of the Federal Trade Commission Act as amended.

JEWEL COMPANIES, INC.

7. Jewel Companies, Inc. (Jewel) is a New York corporation with its principal office at 5725 East River Road, Chicago, Illinois.

8. In 1979 Jewel operated a chain of approximately 637 retail grocery stores located throughout the United States.

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9. Jewel's total sales for the year ended February 2, 1980 amounted to $3,764,266,000.

10. In 1979 Jewel operated 12 retail grocery stores in the Milwaukee, Wisconsin SMSA.

ACQUISITION AGREEMENT

11. On or about October 13, 1980, Godfrey and Jewel entered into an acquisition agreement under the terms of which Godfrey will acquire the assets of all Jewel's Wisconsin retail grocery stores and assume the leases of at least eleven and possibly twelve stores. Godfrey will assume the lease of the twelfth grocery store unless prohibited by the terms of the lease. The practical result of this agreement, if consummated, would be the acquisition of eleven and possibly all twelve of Jewel's Milwaukee SMSA stores by Godfrey.

TRADE AND COMMERCE

RELEVANT LINE OF COMMERCE

12. A relevant line of commerce in which to assess Godfrey's proposed acquisition of Jewel's Milwaukee SMSA stores is retail grocery store sales.

13. Concentration in the relevant line of commerce is high in the relevant section of the country alleged below.

RELEVANT SECTION OF THE COUNTRY

14. A relevant section of the country is the Milwaukee, Wisconsin SMSA.

15. Sales by grocery stores in the Milwaukee SMSA were $930,147,000 in 1977 and approximately $1,131,835,000 in 1979.

16. In 1979, Godfrey owned or franchised 42 retail grocery stores in the Milwaukee SMSA. Godfrey ranked as the second largest firm in that market with a market share of approximately 19% including sales by both corporately owned and franchised Sentry stores.

17. In 1979, Jewel operated 12 retail grocery stores in the Milwaukee SMSA; it ranked as the fourth largest firm in that market with a market share of approximately 7.4%.

18. Godfrey and Jewel have been for many years and were, until October 25, 1980 when Jewel closed its Milwaukee SMSA grocery stores, direct and substantial competitors of one another in the relevant line of commerce in the Milwaukee SMSA.

EFFECTS OF THE ACQUISITION

19. The effects of the proposed acquisition set forth in Paragraph 11 herein may be substantially to lessen competition or tend to create a monopoly in the relevant market, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the acquisition constitutes an unfair method of competition and an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) in the following ways among others:

a) The elimination of actual competition between Godfrey and Jewel in the Milwaukee SMSA;

b) increased concentration in the retail grocery store business in the Milwaukee SMSA;

c) potentially weakening competition from independent retail grocery competitors of Godfrey and Jewel in the Milwaukee SMSA by impairing the ability of independent retail grocery store operators in the Milwaukee SMSA to compete; and

d) the encouragement of further acquisitions and mergers by and among other leading firms in the retail grocery store business in the Milwaukee SMSA.

VIOLATION CHARGED

20. The acquisition by Godfrey of Jewel assets, if effected, would for the reasons set forth herein constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

21. By entering into the agreement which would give rise to the violation described in Paragraph 20, herein, Godfrey has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

Decision and Order

The Federal Trade Commission having initiated an investigation of the acquisition by Godfrey Company of certain assets of Jewel Companies, Inc., and Godfrey Company having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent named in the caption hereof with violation of Section 5 of

the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended; and

Respondent Godfrey Company, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Godfrey Company of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Godfrey Company that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Godfrey Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its principal executive offices located at 1200 West Sunset Drive, in the City of Waukesha, State of Wisconsin.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order To Divest and Other Relief

I.

As used in this order:

(A) *Godfrey* means Godfrey Company, a corporation organized under the laws of Wisconsin with its principal executive offices at 1200 West Sunset Drive, Waukesha, Wisconsin and its directors, officers, agents and employees, and its subsidiaries, successors and assigns.

(B) *Jewel* means Jewel Companies, Inc., a corporation organized

under the laws of New York with its principal executive offices at 5725 East River Road, Chicago, Illinois.

(C) *Retail grocery stores* are retail food stores presently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food, and non-edible grocery items. In addition, these stores often sell smoked and prepared meats, and fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats.

(D) *The Milwaukee SMSA* means the Milwaukee Standard Metropolitan Statistical Area, consisting of the four Wisconsin counties of Milwaukee, Waukesha, Washington and Ozaukee.

(E) *Godfrey stores* means those retail grocery stores in the Milwaukee SMSA owned by or operated by Godfrey.

(F) *Jewel stores* means those retail grocery stores in the Milwaukee SMSA owned or operated by Jewel.

(G) The *disposition stores* means the following Godfrey ("G") stores and Jewel ("J") stores:

1. G–427 (3045 S. 13th St., Milwaukee, WI.)
2. G–607 (6077 S. Packard Ave., Cudahy, WI.)
3. G–810 (3939 S. 76th St., Milwaukee, WI.)
4. J–1201 (1201 N. 35th St., Milwaukee, WI.)
5. J–729 (729 S. Layton Blvd., Milwaukee, WI.)
6. J–15182 (N81 W15182 Appleton Ave., Menomonee Falls, WI.)
7. J–6251 (6251 S. 27th St., Greenfield, WI.)

(H) *Acquisition, acquire, merger,* or *merge with* includes all other forms of arrangement by which Godfrey may obtain, directly or indirectly, all or any part of the stock or assets, both tangible and intangible, of any other retail grocery store or stores.

II.

It is ordered, That within six months from the date on which this order becomes final, Godfrey shall divest itself absolutely and in good faith of all of its right, title and interest in the disposition stores; *provided, however,* that Godfrey may, if so required by the lessor(s) of any one or more of the disposition stores, remain a party to its lease with such lessor(s) and may take possession of any of the disposition stores upon default under the lease or sublease for such store by the sublessee which acquired such disposition store from Godfrey. In the event of such reacquisition of any of the disposition

stores, Godfrey shall divest the reacquired disposition store in accordance with the terms of this order within six (6) months of the date of reacquisition of any such store. Until approval of divestiture, Godfrey shall continue to operate disposition stores G–427, G–607 and G–810 as retail grocery stores. Divestiture shall be made only to an acquirer or acquirers approved in advance by the Federal Trade Commission. The purpose of the divestiture required by this paragraph is to assure the continued operation of the disposition stores as retail grocery stores and their survival as viable competitors in the Milwaukee SMSA.

III.

It is further ordered, That for a period of ten (10) years from the date on which this order becomes final, Godfrey shall not merge with or acquire, or merge with or acquire and thereafter hold, as corporately operated or as franchised retail grocery stores, directly or indirectly through subsidiaries or in any other manner, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or assets of any individual, firm, partnership, corporation or other legal or business entity which directly or indirectly owns or operates any retail grocery store, where such acquisition or merger involves four or more such retail grocery stores; *provided, however,* that nothing in this order shall be construed to prevent Godfrey from being or becoming a guarantor of lease obligations of any Godfrey franchisee.

IV.

It is further ordered, That within sixty (60) days from the date on which this order becomes final and every sixty (60) days thereafter until the divestiture required by paragraph II of this order is completed, Godfrey shall submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which Godfrey intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time be required. In addition, upon written request of the staff of the Federal Trade Commission, Godfrey shall submit such reports in writing with respect to the other requirements of this order as may from time to time be requested.

V.

It is further ordered, That Godfrey notify the Federal Trade

Commission at least thirty (30) days prior to any proposed corporate changes, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance with the obligations arising out of this order.

IN THE MATTER OF

HORIZON CORPORATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9017. Complaint, March 11, 1975—Final Order, May 15, 1981

This order requires, among other things, a Tucson, Arizona land sales company, one of the largest sellers of undeveloped land in the Southwest, to establish as specified in order, a $14.5 million trust fund to be distributed to eligible past purchasers. The order also requires the firm to make prescribed disclosures regarding the risks involved in undeveloped land investment; provide purchasers with a cooling-off period in which to cancel their dealings; and furnish a "NOTICE TO BUYERS" that provides prospective purchasers with pertinent information regarding the property, roads, utilities and recreational facilities. Respondent is further prohibited from discouraging purchasers from consulting with a real estate specialist prior to purchase; using high pressure sales tactics; using state and federal property reports as endorsements and utilizing certain contractual provisions, including one whereby defaulting purchasers forfeit all payments made. Additionally, the firm is required to ensure that $45 million is spent to improve certain properties over a 20-year period and establish and maintain a surveillance program designed to detect violations of the order.

Appearances

For the Commission: *Alan N. Schlaifer, S. Ricardo Narvaiz, Eugene Kaplan* and *Lemuel Dowdy.*

For the respondent: *Glenn A. Mitchell* and *David Fierst, Stein, Mitchell & Mezines,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Horizon Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent Horizon Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 4400 East Broadway, Tucson, Arizona.

2. Respondent Horizon Corporation, from its aforementioned principal place of business, operates through, dominates and controls the acts and practices of its subsidiaries, and derives pecuniary and other benefits from the acts and practices of said subsidiaries.

3. Respondent is now, and for some time last past has been engaged, directly or through its subsidiaries, in the business of acquiring undeveloped land, subdividing said land into lots, and advertising, offering for sale, and selling said lots to the public.

4. Among the properties in which lots have been and/or are being offered for sale by respondent are the properties known as Paradise Hills and Rio Communities located in the State of New Mexico; Horizon City and Waterwood located in the State of Texas; and Arizona Sunsites, Whispering Ranch, and New Tucson located in the State of Arizona. The acreage of these properties is substantial. Most of these properties are divided into numerous and variously named subdivisions.

5. Respondent usually sells the lots in its properties to purchasers who have not seen their land by means of standard form contracts, titled "Agreement for Deed" and "Receipt of Deposit", hereinafter referred to in this Complaint as a "contract", whereby the purchaser generally pays monthly installments over a term of approximately eight years. According to the provisions of the contract, title to the lot remains in the respondent until final payment is made, at which time title to the lot passes to the purchaser. As to most of its properties, respondent agrees in the contract only to cause a road fronting on the property to be completed within thirty days after the purchaser has completed his payments or approximately eight years from the date of signing the contract, whichever is later. The contract provides that the purchaser pays interest to respondent during the contract term on the unpaid balance owing under the contract.

6. In the course and conduct of the aforesaid business, respondent now causes, and for some time last past has caused, its promotional materials, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from its place of business in Arizona to its agents, representatives, employees, customers and prospective customers in various other States and territories of the United States, the District of Columbia, and foreign nations. Respondent now maintains and operates, and for some time last past has maintained and operated, places of business and has made substantial sales to purchasers in the various other States of the United States, the District of Columbia and foreign nations. Respondent maintains, and at all times mentioned herein has

maintained, a substantial course of trade in said land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

7. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of land.

8. In the course and conduct of the aforesaid business, respondent disseminates advertisements through television and radio broadcasts and in various publications of general circulation, distributes promotional material through the mail and in person to members of the public, and makes sales presentations by means of oral and written statements, slides and movies. By and through such means, respondent has made and is making various statements and representations, directly or by implication, concerning the size, good reputation, financial security, and integrity of Horizon Corporation.

9. By and through the use of such statements and representations, respondent Horizon Corporation has permitted and participated in the use of its name for the purpose of selling land and deriving pecuniary benefits therefrom.

I

10. In the further course and conduct of the aforesaid business, respondent disseminates advertisements through television and radio broadcasts and in various publications of general circulation, distributes promotional materials through the mail and in person to members of the public, and makes sales presentations by means of oral and written statements, movies and slides. By and through such means, respondent has made and is making various statements and representations concerning the supply of and demand for land; the liquidity or marketability of land; land prices and values; land as an investment; principles of buying land; personal financial security; inflation; the stock market, banks and annuities; population growth and movement; the location of industrial, commercial and recreational facilities; the past, present and future suitability of lots in respondent's properties for investments or homesites; the financial terms for real estate investment; the size of respondent's assets and net worth; the tax advantages of owning real estate; the various options or financial protections afforded purchasers of respondent's land; and the repurchase or resale by respondent of lots acquired by purchasers from respondent.

11. By and through the statements and representations alleged

in Paragraph 10 herein, respondent has represented and is representing, directly or by implication, that the lots which respondent is offering for sale are, at the prices at which respondent is offering them for sale, excellent investments, and that there is little or no financial risk involved in the purchase of said lots at said prices.

12. In truth and in fact, in a significant number of instances the lots which respondent is offering for sale, at the prices at which respondent is offering them for sale, are not excellent investments involving little or no financial risk to purchasers. Therefore, the acts and practices alleged in Paragraph 10 herein are deceptive.

II

13. In the further course and conduct of the aforesaid business, respondent has offered and is offering for sale lots in its properties without disclosing to prospective purchasers that the lots being offered are, at the prices at which respondent is offering them, risky investments in that, *inter alia,* the future value of the lots being offered is uncertain and the purchaser probably will be unable to sell his lot, or his interest in it under the contract, at or above the purchase price. Therefore, respondent has failed to disclose material characteristics of its lots which, if known to certain consumers, would be likely to affect their consideration whether to purchase a lot from respondent. Such failure to disclose is a deceptive or unfair act or practice.

III

14. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, concerning the past, present, and future development of respondent's properties, and inclusiveness of the purchase price of a lot. The aforesaid statements and representations use words and terms such as "communities", "community developer", "master plan", "land use plan", "new cities" and other words or terms of similar import.

15. By and through the statements and representations alleged in Paragraph 14 herein, respondent has represented and is representing, directly or by implication, that substantially all lots are now, or by approximately the end of the purchaser's scheduled

payments will be, located within a self-contained and fully developed community, and that the price of the aforesaid lots is all-inclusive.

16. In truth and in fact:

(a) Lots in respondent's properties are not now and will not be, by approximately the end of the purchaser's scheduled payments, located within a self-contained and fully developed community.

(b) It is not part of respondent's express contractual obligation, nor is it part of respondent's land development program, to develop its properties beyond the placement of an unpaved road fronting the purchaser's property. Respondent has no obligation to maintain these roads.

(c) Respondent's properties consist primarily of vacant acreage with limited industrial, commercial, shopping and recreational facilities; limited amenities; and limited public services. In substantially all instances the only building which has occurred or, in most instances, is likely to occur in each property is in areas reserved by respondent. The amount of such building is insignificant in relation to the total acreage of each property and the length of time respondent has been offering for sale and selling lots located within each property.

(d) The purchase price of substantially all lots in respondent's properties is not all-inclusive.

(i) For substantially all lots in respondent's properties other than Waterwood, paved roads and central sewer systems are not available. Telephone service and electricity are available only at unreasonable prices. Central water systems are either not available or available only at unreasonable prices. In addition, most purchasers are required to join and make payments to an improvement association.

(ii) For most lots in Waterwood, central water and sewer systems, paved roads, electricity and telephone service are available only through substantial payments which all purchasers are required to make to an improvement association and to a municipal utility district. Such payments include both annual charges and a one-time charge at the time the purchaser desires that such services and utilities be made available. In addition, the purchaser must also fulfill other significant conditions in order to obtain such utilities and services for his lot.

Therefore, the acts and practices alleged in Paragraph 14 herein are deceptive.

IV

17. In making the statements and representations alleged in Paragraph 14 herein containing express or implied references to the past, present and future development of respondent's properties, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, the following information:

(a) Lots in respondent's properties are not now and will not be, by approximately the end of the purchaser's scheduled payments, located within a self-contained and fully developed community.

(b) It is not part of respondent's express contractual obligation, nor is it part of respondent's land development program, to develop its properties beyond the placement of an unpaved road fronting the purchaser's property. Respondent has no obligation to maintain these roads.

(c) Respondent's properties consist primarily of vacant acreage with limited industrial, commercial, shopping and recreational facilities; limited amenities, and limited public services. In substantially all instances the only building which has occurred or, in most instances, is likely to occur in each property is in areas reserved by respondent. The amount of such building is insignificant in relation to the total acreage of each property and the length of time respondent has been offering for sale and selling lots located within each property.

(d) The purchase price of substantially all lots in respondent's properties is not all-inclusive.

(i) For substantially all lots in respondent's properties other than Waterwood, paved roads and central sewer systems are not available. Telephone service and electricity are available only at unreasonable prices. Central water systems are either not available or available only at unreasonable prices. In addition, most purchasers are required to join and make payments to an improvement association.

(ii) For most lots in Waterwood, central water and sewer systems, paved roads, electricity and telephone service are available only through substantial payments which all purchasers are required to make to an improvement association and to a municipal utility district. Such payments include both annual charges and a one-time charge at a time the purchaser desires that such services and utilities be made available. In addition, the purchaser must also

fulfill other significant conditions in order to obtain such utilities and services for his lot.

Each element of information set forth above is a material fact, knowledge of which would be likely to affect the decision of certain consumers whether to sign a contract for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is an unfair or deceptive act or practice.

V

18. In the further course and conduct of the aforesaid business, respondent has offered and is offering for sale property divided into numerous and variously named subdivisions. The names of such subdivisions are often similar to each other; and, in addition, such subdivisions or the properties in which they are located are often referred to collectively.

19. The practices alleged in Paragraph 18 herein have the capacity and tendency to lead significant numbers of consumers to believe that the past, present or planned development for one subdivision is the same as the past, present or planned development for another subdivision.

20. In truth and in fact, respondent offers for sale and does sell lots in subdivisions which have not received and are not intended by respondent to receive the same degree of development. Therefore, the acts or practices alleged in Paragraph 18 are deceptive.

VI

21. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public and to persons who have purchased respondent's lots, by means of various publications of general circulation, promotional materials, and sales presentations involving oral statements, written statements, movies and slides, concerning the locations; the designation as "single-family residential", "multi-family residential" or "commercial"; and the value of respondent's lots; and, in the case of persons who have already purchased lots, the exchange of their lots for other, more expensive lots.

22. By and through the statements and representations alleged in Paragraph 21 herein, respondent has represented and is representing, directly or by implication, that more expensive lots having certain locations or certain designations have a greater value than

other lots, and, accordingly, in the case of persons who have already purchased lots, that it is generally to their advantage to exchange their lots for more expensive lots in other locations or with other designations.

23. In truth and in fact, in substantially all instances there is no significant difference in the value, if any, of lots offered for sale, regardless of their location or designation; and, accordingly, in the case of persons who have already purchased lots, it is not generally to their advantage to exchange their lots for more expensive lots in other locations or with other designations. Therefore, the acts and practices alleged in Paragraph 21 herein are deceptive.

VII

24. In making the statements and representations alleged in Paragraph 21 herein, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, that the designation of lots as "single-family residential", "multi-family residential" or "commercial" is only the designation used by respondent; that in substantially all instances there is no significant difference in the value, if any, of lots offered for sale, regardless of their location or designation; and that, accordingly, in the case of persons who have already purchased lots, it is not generally to their advantage to exchange their lots for more expensive lots in other locations or with other designations. These are material facts, knowledge of which would be likely to affect the decision of certain consumers whether to sign a contract for the purchase of land from respondent or, in the case of persons who have already purchased land from respondent, whether to exchange their lots for more expensive lots in other locations or with other designations. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

VIII

25. In the further course and conduct of the aforesaid business, respondent has made and is making various oral statements and representations to prospective purchasers concerning repurchase or resale by respondent of lots acquired by purchasers from respondent.

26. By and through the statements and representations alleged in Paragraph 25 herein, respondent has represented and is representing, directly or by implication, that it will either buy back from or resell for purchasers lots acquired from respondent.

27. In truth and in fact, respondent does not buy back from or

resell for purchasers lots acquired from respondent. Therefore, the acts and practices alleged in Paragraph 25 herein are unfair or deceptive.

IX

28. In the further course and conduct of the aforesaid business, and in some instances after a purchaser has signed a contract, respondent has made and is making various statements and representations to members of the public and to persons who have purchased respondent's lots, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, concerning the sizes of respondent's lots and the ability of owners of such lots to fully use their property for homesites now or in the future.

29. By and through the statements and representations alleged in Paragraph 28 herein, respondent has represented and is representing, directly or by implication, that all or substantially all the land within a designated lot is now or will be in the future fully usable by the owner.

30. In truth and in fact, in many instances all or substantially all the land within a designated lot is not now and will not in the future be fully usable by the owner, because various easements and other physical features affect the full use and enjoyment of said lot. Therefore, the acts and practices alleged in Paragraph 28 herein are deceptive.

X

31. In making the statements and representations alleged in Paragraph 28 herein containing express or implied references to the sizes of respondent's lots and the ability of owners of such lots to fully use their property for homesites now or in the future, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, the existence, nature, location, size and significance of all easements and other physical features which affect the full use and enjoyment of such lots. These are material facts, knowledge of which would be likely to affect the decision of certain consumers whether to sign contracts for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XI

32. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, wherein certain well-known personalities, specifically Merv Griffin and Leif Erickson, make statements and representations concerning, but not limited to, the values, marketability and liquidity of land; population growth; land as an investment; and their ownership of respondent's property.

33. By and through the statements and representations alleged in Paragraph 32 herein, respondent has represented and is representing, directly or by implication, that the aforesaid personalities have purchased respondent's land and that they did so because they believed that respondent's land was a good investment.

34. In truth and in fact, the aforesaid personalities have not purchased land from respondent but were paid substantial sums by respondent to make the statements and representations alleged in Paragraph 32 herein, and, in addition, were given land by respondent. Therefore the acts and practices alleged in Paragraph 32 herein are deceptive or unfair.

XII

35. In making the statements and representations alleged in Paragraph 32 herein, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, that the aforesaid well-known personalities were paid substantial sums of money by respondent to make the statements and representations alleged in Paragraph 32 herein, and that the land they own was given to them by respondent. Therefore, respondent has failed to disclose material facts which, if known to certain consumers, would be likely to affect their decision whether to sign contracts for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XIII

36. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and repre-

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sentations to members of the public, by means of promotional materials and oral statements, concerning the improvement associations which purchasers of respondent's land are required to join.

37. By and through the statements and representations alleged in Paragraph 36 herein, respondent has represented and is representing, directly or by implication, that the presence of such an association will increase the value of property which is subject to the association.

38. In truth and in fact, the presence of most of said associations, in and of themselves, does not increase the value of properties which are subject to said associations. Therefore, the aforesaid acts and practices alleged in Paragraph 36 herein are deceptive or unfair.

XIV

39. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, concerning the size of respondent's assets and net worth.

40. By and through the statements and representations alleged in Paragraph 39 herein, respondent has represented and is representing, directly or by implication, that its assets and net worth are at least as great as the amounts stated.

41. In truth and in fact, in many instances at the times when respondent has made the statements and representations alleged in Paragraph 39 herein, respondent's total assets and net worth have been substantially less than the amounts stated. Therefore, the aforesaid acts and practices alleged in Paragraph 39 herein are deceptive and unfair.

XV

42. In the further course and conduct of the aforesaid business, respondent has made and is making various statements orally and in promotional materials concerning travel allowances, "Property Visit Credit Certificates" or other allowances which respondent will provide to a purchaser to help defray the cost of a vist to the purchaser's lot.

43. By and through the statements alleged in Paragraph 42 herein, respondent has represented and is representing, directly or by implication, that the travel allowances, "Property Visit Credit

Certificates", or other allowances promised by respondent are either actual payments to the purchaser in the form of cash or checks or immediate deductions from the purchaser's currently scheduled payments, and that such payments or deductions are made upon completion of a visit to the purchaser's lot as reimbursement for the purchaser's expenses.

44. In truth and in fact, the "travel allowances", "Property Visit Credit Certificates", or other allowances provided by respondent upon a visit by a purchaser to his lot are not actual payments in the form of cash, checks, or immediate deductions from the currently scheduled payments, but are deductions from the remaining account balance at the time the principal balance is equal to the amount of the allowance, providing that a company-guided tour is made within one year of the date of the acceptance of the contract and that the payments due under the contract have been current throughout the term of the contract. Therefore, the acts and practices alleged in Paragraph 42 herein are deceptive.

XVI

45. In the further course and conduct of the aforesaid business, respondent has made and is making statements and representations in promotional materials which use, set forth or refer to all or part of various endorsements, testimonials and printed articles concerning, but not limited to, the size, good reputation, financial security and integrity of respondent; the past, present and future development of respondent's properties; land prices and values; land as an investment; and population and industrial growth and movement.

46. By and through the statements and representations alleged in Paragraph 45 herein, respondent has represented and is representing, directly or by implication, that the aforesaid articles, endorsements and testimonials were originally published or made in the recent past.

47. In truth and in fact, in all or substantially all instances when so represented, the aforesaid articles, endorsements and testimonials were not originally published or made in the recent past. Therefore, using or referring to the aforesaid articles, endorsements or testimonials which were not originally published or made in the recent past is an unfair or deceptive act or practice.

XVII

48. In making the statements and representations alleged in Paragraph 45 herein, respondent has failed to disclose clearly and

conspicuously, and in reasonable conjunction with such statements and representations, the date when each of the aforesaid articles, endorsements and testimonials was originally published or made. Therefore, respondent has failed to disclose material facts, which, if known to certain consumers, would be likely to affect their decision whether to sign a contract for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XVIII

49. In the further course and conduct of the aforesaid business, respondent has made and is making statements orally in sales presentations concerning the prices and locations of the lots being offered for sale and to be offered for sale.

50. By and through the statements alleged in Paragraph 49 herein, respondent has represented and is representing, directly or by implication, that a prospective purchaser must purchase a lot immediately to insure that the price will not increase or that the desired location will be available.

51. In truth and in fact, most prospective purchasers do not have to purchase immediately to insure that prices will not increase or that desired locations will be available. Therefore, the acts and practices alleged in Paragraph 49 herein are deceptive or unfair.

XIX

52. In the further course and conduct of the aforesaid business, respondent is offering and disseminating promotional materials which purport to provide informed and unbiased advice on the purchase of land, and which often purport to have a specific dollar value.

53. By and through the practices alleged in Paragraph 52 herein, respondent has represented and is representing, directly or by implication, that these materials set forth comprehensive, informed, unbiased, prudent and generally accepted principles of purchasing land; and, that in many instances, these materials are distributed to the general public by widely-known publishers and are sold at the prices stated thereon.

54. In truth and in fact, these materials do not set forth comprehensive, informed, unbiased, prudent and generally accepted principles of purchasing land; have never been distributed to the general public by widely-known publishers; and have never been sold

at the prices stated thereon or at any other prices. Therefore, the acts and practices alleged in Paragraph 52 herein are deceptive.

XX

55. In the further course and conduct of the aforesaid business, and in some cases after a purchaser has signed a contract, respondent has made and is making various statements in promotional materials and orally concerning its purpose in contacting members of the public, holding "dinner parties" or other gatherings, or in offering publications, goods or services free or at low cost.

56. By and through the statements alleged in Paragraph 55 herein, respondent has represented and is representing, directly or by implication, that its purpose in contacting members of the public, inviting them to dinner parties or other gatherings, or in offering publications, goods or services free or at low cost, is, *inter alia,* to conduct a bona fide survey, or to furnish the public unbiased information on the purchase of land as an investment without any obligation or pressure whatsoever, or, in the case of persons who are already holders of respondent's land, to advise them on the status of their property.

57. In truth and in fact, respondent's purpose in contacting or making offers to members of the public or in holding dinner parties or other gatherings, or in offering publications, goods or services free or at low cost is to induce the signing of contracts for the purchase of respondent's land, or, in the case of persons who are already holders of respondent's land, to induce the signing of contracts for the purchase of additional land from respondent or to induce them to exchange their lots for other, more expensive lots. Therefore, the acts and practices alleged in Paragraph 55 herein are deceptive.

XXI

58. In making the statements and representations alleged in Paragraph 55 herein, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction therewith, that respondent's true purpose in contacting or making offers to members of the public and persons who are already holders of respondent's land, or in holding dinner parties or other gatherings, or in offering publications, goods or services free or at low cost, is to induce the signing of contracts for the purchase of respondent's land, or, in the case of persons who are already holders of respondent's land, to induce the signing of contracts for the purchase of additional land from respondent or to induce them to exchange their lots for other,

more expensive lots. Therefore, respondent has failed to disclose material facts which, if known to certain consumers, would be likely to affect their decision whether to sign contracts for the purchase of respondent's land, or, in the case of persons who are already holders of respondent's land, to purchase additional lots, or exchange lots they own for more expensive lots. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XXII

59. In the further course and conduct of respondent's business, in obtaining a purchaser's signature on a contract, respondent has presented and is presenting purchasers with a contract, a property report required to be provided to the purchaser by federal law, various other written and illustrated publications, and in some instances additional lengthy or detailed documents. These documents and publications contain information and provisions likely to affect the decision of certain consumers whether to sign a contract for the purchase of respondent's land.

60. Respondent frequently has made and is making available the aforesaid documents and publications at dinner parties or other gatherings sponsored by respondent or under such circumstances that it is likely that many purchasers will not read such documents and publications because they are insufficiently aware of their utility or significance, or it is likely that many purchasers will not read such documents and publications carefully, completely or with full comprehension of their meaning and import. The soliciting or obtaining under such circumstances of an agreement to purchase respondent's land, involving a substantial financial commitment by the purchaser, is an unfair or deceptive act or practice.

XXIII

61. In the further course and conduct of the aforesaid business, respondent has utilized and is utilizing contracts, the provisions of which are not understandable to many consumers or cannot be evaluated by many consumers to determine if they are fair or unfair. Respondent has made and is making the contracts available to prospective purchasers, and soliciting and obtaining signatures to the contracts from purchasers, in circumstances where the purchaser has not had the opportunity to seek assistance or counsel in understanding the provisions or making the aforesaid determination.

62. The soliciting or obtaining of an agreement to purchase

respondent's land, involving a substantial financial commitment by the purchaser, where the purchaser has not had the opportunity to seek assistance or counsel for the purposes referred to in Paragraph 61 herein, is an unfair act or practice.

XXIV

63. In the further course and conduct of the aforesaid business, respondent has utilized and is utilizing two lengthy, detailed and seemingly unrelated documents entitled "Receipt of Deposit" and "Agreement for Deed" which together make up respondent's contract.

64. The use of the two aforesaid documents has the capacity and tendency to mislead purchasers as to the significance of said documents. Therefore, the use of the aforesaid documents constitutes an unfair or deceptive act or practice.

XXV

65. Respondent, in the further course and conduct of the aforesaid business, has utilized and is utilizing standard form contracts.

66. The aforesaid contracts contain a condition of sale, embodied on the reverse side of the "Agreement for Deed", that there is no understanding or agreement between the parties except as expressly set forth in the "Agreement for Deed" or the "Receipt of Deposit."

67. The use by respondent of the aforesaid condition of sale is an unfair or deceptive act or practice because respondent makes representations, directly or by implication, through advertisements in publications of general circulation, in promotional materials, and in sales presentations, by means of oral and written statements, slides and movies, which differ in material respects from the obligations of respondent or purchasers under said contracts.

XXVI

68. The aforesaid contracts contain various conditions and provisions which are printed on the reverse side of the "Agreement for Deed" in a manner which is not clear and conspicuous.

69. The practices alleged in Paragraph 68 herein are unfair or deceptive because they have a tendency and capacity to cause purchasers of respondent's lots to ignore conditions and provisions printed on the reverse side of the agreement and to mislead such purchasers as to the significance of such conditions and provisions.

XXVII

70. Most of the aforesaid contracts subject a purchaser to an annual assessment and membership in an improvement association, which purportedly is to provide improvements, amenities and public services which respondent has represented, directly or by implication, by and through the statements and representations alleged in Paragraph 14 herein, that it will provide to purchasers. Said associations have the authority to use the funds collected for improvements, amenities and public services for a purchaser's lot. However, most of said associations have no obligation to spend said funds for the benefit of a specific purchaser's lot.

71. In most instances the requirement that a purchaser pay annual assessments to and become a member of such an association is an unfair or deceptive act or practice because (i) the purchaser is obligated to pay monies to an association with no corresponding obligation by the association to spend these funds for the benefit of the purchaser's lot, and (ii) respondent has represented that it would provide, at no additional cost, the improvements which the associations are authorized but not obligated to provide to the purchaser.

XXVIII

72. The aforesaid contracts contain, within the "Receipt of Deposit", a declaration by the purchaser that the purchaser has received and read any property reports or offering statements required to be made available to prospective purchasers by federal or state law.

73. The use by respondent of the aforesaid declaration is an unfair or deceptive act or practice because respondent frequently fails to give the purchaser the property report or offering statement prior to the signing by the purchaser of the contract, or frequently makes available the property report or offering statement in circumstances where it is likely that many purchasers will not read such documents because they are insufficiently aware of their utility or significance, or it is likely that many purchasers will not read such documents carefully, completely, or with full comprehension of their meaning and import.

XXIX

74. The aforesaid contracts also provide, within the "Agreement for Deed", that upon a failure of the purchaser to pay any

installment due under the contract, the seller shall be entitled to retain all sums previously paid thereunder by the purchaser.

75. The use by respondent of the aforesaid provision is an unfair act or practice because the sums retained by the respondent are not calculated to bear any relation to the actual damages, if any, sustained by respondent by reason of the purchaser's default.

XXX

76. In the further course and conduct of the aforesaid business, respondent has utilized and is utilizing forms entitled "Receipt of Deposit", "Agreement for Deed" and "Property Visit Credit Certificate", which in most instances contain a refund provision, which specifies that a purchaser may obtain a refund if the purchaser completes a company-guided inspection tour of the property in which the purchaser's land is located within one year of the date of purchase, and, upon completion of the aforesaid tour and while still on the property, sets forth on the respondent's refund request form the details of how the property was misrepresented at the time of sale. In addition, the aforesaid form provides that purchasers will be entitled to a deduction of the amount stated on the form from the remaining account balance at the time the principal balance of the contract is equal to the amount stated, if the aforesaid tour is taken within one year of the date of purchase and if a declaration is obtained from the purchaser that he has seen his land, that it is as represented, and that he is satisfied with his property investment.

77. The use by respondent of the provision as alleged in Paragraph 76 herein is an unfair act or practice because it requires the purchaser to incur the expense of traveling to the property and taking the company-guided inspection tour but (i) it is often not possible for the purchaser to see his land, and therefore not possible for him to make a declaration that he has seen his land; and (ii) irrespective of whether the purchaser does see his land, it may not be possible for him to ascertain whether the property is as represented or was misrepresented at the time of sale, or whether he is satisfied with his property investment, and, therefore not possible for him to make a declaration that the property is as represented or that he is satisfied with his property investment, or to set forth how the property was misrepresented at the time of sale.

XXXI

78. In the further course and conduct of the aforesaid business, and after a purchaser has signed a contract, respondent has made

and is making various statements and representations to such previous purchasers and others, through oral statements, and by written materials, concerning the current value of lots which have previously been purchased from respondent.

79. By and through the statements and representations alleged in Paragraph 78 herein, respondent has represented and is representing, directly or by implication, that the value of lots typically has increased significantly since the time of their purchase from respondent.

80. In truth and in fact, the value of lots typically does not increase significantly after their purchase from respondent. Therefore, the acts and practices alleged in Paragraph 78 herein are deceptive.

XXXII

81. In the further course and conduct of the aforesaid business, respondent as aforesaid has induced and is inducing members of the public through unfair and deceptive acts and practices to pay to it, in advance of passage of title, substantial sums of money toward the purchase of lots located within respondent's properties known as Rio Communities located in the State of New Mexico, Horizon City located in the State of Texas, and Whispering Ranch located in the State of Arizona. Said lots are of little value to purchasers as investments and little use as homesites. Respondent has received and is receiving the said sums and has failed to offer to refund or refused to refund such money to purchasers.

82. The use by respondent of the aforesaid practices and respondent's continued retention of the sums, as aforesaid, is an unfair act or practice.

XXXIII

83. In the course and conduct of the aforesaid business, respondent as aforesaid has utilized and is utilizing in its standard form contracts a provision whereby defaulting purchasers forfeit all payments previously made to respondent under the contract. Respondent has received and is receiving said payments and has failed to offer to refund or refused to refund to defaulting purchasers all payments in excess of respondent's reasonable damages caused by the purchaser's default.

84. The continued retention by respondent of payments in excess of reasonable damages, as aforesaid, is an unfair act or practice.

XXXIV

85. Respondent as aforesaid (i) has induced and is inducing members of the public through unfair and deceptive acts and practices to pay to respondent substantial sums of money toward the purchase of respondent's lots, and (ii) has continued to retain substantial sums in excess of its reasonable damages as a result, as aforesaid, of the unfair forfeiture provision in its contracts.

86. The effect of using the aforesaid acts and practices to secure and retain substantial sums of money is or may be to substantially hinder, lessen, restrain or prevent competition between respondent and the aforesaid competitors.

XXXV

87. The use by respondent of the aforementioned unfair and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are true, and into the purchase of substantial numbers of respondent's lots because of said mistaken and erroneous belief.

XXXVI

88. The aforementioned acts and practices, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Initial Decision by Ernest G. Barnes,

Administrative Law Judge

September 21, 1979

Preliminary Statement

The complaint in this proceeding issued against respondent, Horizon Corporation, on March 11, 1975. The complaint contains thirty-six separate allegations of unfair or deceptive acts and practices and unfair methods of competition in or affecting commerce arising out of the sale or offering for sale of undeveloped land

in the states of Texas, Arizona and New Mexico. These complaint allegations can be summarized as follows:

COUNT I

Respondent's lots offered for sale are represented to be excellent investments at the prices offered with little or no financial risk involved, whereas in a substantial number of instances the lots are not excellent investments involving little or no risk.

COUNT II

Respondent failed to disclose material characteristics of the lots in that the lots are risky investments because (1) their future value is uncertain, and (2) purchasers will probably be unable to sell the lots at or above the purchase price. **[2]**

COUNT III

Respondent made representations concerning the past, present, and future development of its properties, used words such as "communities," "community developer," "master plan," "new cities," etc., represented that by the end of the purchaser's scheduled payments, all lots would be located within a self-contained and fully developed community, and that the price of its lots would be all-inclusive. In fact:

(1) lots are not and will not be, by the end of scheduled payments, located within a self-contained and fully developed community;

(2) respondent's only express contractual obligation is to place an unpaved road fronting the purchaser's property which respondent does not have to maintain;

(3) respondent's properties consist primarily of vacant acreage with little development; the only building which has occurred and is likely to occur is in areas reserved by respondent, and development to date is insignificant in relation to the total acreage and length of time the property has been offered for sale;

(4) the purchase price of the lots is not all-inclusive since (a) paved roads, sewer, telephone, electricity and water are not available except at unreasonable prices and most purchasers are required to join and pay to an improvement association, and (b), in the Waterwood property, water and sewer are available only through substantial payments on an annual basis and a one-time connection charge.

COUNT IV

Respondent failed to disclose clearly and conspicuously in conjunction with representations about past, present and future development of properties the material facts about its property set forth above in Count III.

COUNT V

Respondent has numerous and variously named subdivisions, often of similar names and often referred to collectively, which leads the consumer to believe the past, present and planned development of one subdivision is the same as that of another, when such is not a fact. [3]

COUNT VI

Respondent has designated lots "single family," "multi-family," or "commercial," and represented that lots in certain locations and having certain designations have greater value than other lots, and has recommended purchasers exchange lots already purchased for more expensive lots, when there is no significant difference in the value of the lots and it is not advantageous to exchange one lot for a more expensive lot.

COUNT VII

Respondent failed to disclose the material facts about lot designations and values, as set forth in Count VI.

COUNT VIII

Respondent represented that it will buy back or resell for purchasers lots acquired from respondent, when such is not a fact.

COUNT IX

Respondent represented that all or substantially all land within a designated lot is fully usable, when easements and other physical features affect the full use and enjoyment of the lot.

COUNT X

Respondent failed to disclose clearly and conspicuously the material facts set forth in Count IX.

COUNT XI

Respondent utilized Leif Erickson and Merv Griffin to make representations about land values, marketability and liquidity, and about their purchase of respondent's property because it was a good investment, when such personalities had not purchased land from respondent.

COUNT XII

Respondent failed to disclose clearly and conspicuously the material facts that the personalities in Count XI did not purchase land from respondent but the land was given to them.

COUNT XIII

Respondent represented that improvement associations which purchasers are required to join will increase the value of the land; when such is not a fact.

COUNT XIV

Respondent misrepresented its assets and net worth. [4]

COUNT XV

Respondent represented that property visit credits and other allowances are either actual cash payments to purchasers or immediate deductions from currently scheduled payments, and that such payments or deductions are made upon completion of a property visit as reimbursement for the purchaser's expenses, when such deductions actually are made at the end of a purchaser's scheduled payments, provided a company-guided tour is made within one year and payments under the contract have been current throughout the term of contract.

COUNT XVI

Respondent used endorsements, testimonials and printed articles and represented they were of recent date, when such was not a fact.

COUNT XVII

Respondent failed to disclose in reasonable conjunction with the

articles described in Count XVI, the material fact of when the articles were originally written or published.

COUNT XVIII

Respondent represented that purchasers must act immediately to insure that the price and lot location will be available, when most purchasers do not have to act immediately to get the price and lot.

COUNT XIX

Respondent represented that materials it provided set forth informed, unbiased, prudent and accepted principles of purchasing land, that these materials have been distributed to the public by well-known publishers and are sold at stated prices, when such is not a fact.

COUNT XX

Respondent holds dinner parties and offers goods and services free or at low cost stating its purpose is to conduct a bona fide survey, or to furnish unbiased information on the purchase of land as an investment without any obligation or pressure, or to advise existing purchasers of the status of their property, when respondent's actual purpose in contacting the public, or existing purchasers, is to induce the purchase of land, or to exchange property previously purchased for more expensive property.

COUNT XXI

Respondent failed to disclose the material fact of the real purpose in holding dinner parties and the offers of free or low cost goods and services. [5]

COUNT XXII

Respondent made available property reports and other lengthy and detailed documents at dinner parties and under other circumstances where it was unlikely they would be read by purchasers fully and with comprehension, and the soliciting and obtaining of substantial financial commitments to purchase land under such circumstances.

COUNT XXIII

Respondent utilized contracts for the purchase of land which cannot be understood and evaluated by purchasers, where the purchaser has not had the opportunity to seek assistance or counsel.

COUNT XXIV

Respondent utilized two lengthy, detailed, and unrelated documents, "Receipt of Deposit" and "Agreement for Deed," which have the capacity and tendency to mislead purchasers as to their significance.

COUNT XXV

Respondent utilized a contract with a statement on the reverse side that there is no understanding or agreement not expressly set forth in the "Agreement for Deed" or "Receipt of Deposit"; at the same time respondent made representations through various advertisements, brochures, movies and other written and oral statements, which differed in material respects from the contracts.

COUNT XXVI

Conditions and provisions on the reverse side of the "Agreement for Deed" were not clear and conspicuous and had the tendency and capacity to cause purchasers to ignore such conditions and provisions, and to mislead purchasers as to their significance.

COUNT XXVII

Respondent's contracts subject a purchaser to pay annual assessments to an improvement association which purportedly is to provide improvements, amenities and services which respondent represented it would provide. The association has the authority to use its funds for such purposes but (1) the association has no obligation to spend the funds for the purchaser's lot, and (2) respondent represented that it would provide, at no additional cost, the improvements which the association is authorized but not obligated to provide.

COUNT XXVIII

A declaration in the "Receipt of Deposit" stated that the purchaser has received and read any property reports and offering statements

required to be made available by federal and state law, when respondent frequently failed to give such reports to the purchaser prior to signing the contract, and frequently made the reports available in circumstances where it is unlikely the purchaser will read such documents or not read such documents carefully, with full comprehension of their meaning and import. [6]

COUNT XXIX

Use by respondent in the "Agreement for Deed" of a clause that upon failure of the purchaser to pay any installment due, respondent shall be entitled to retain all sums previously paid, where the sums retained are not calculated to bear any relation to actual damages sustained by respondent by reason of the purchaser's default.

COUNT XXX

Respondent utilized agreements which contain a provision that a purchaser may obtain a refund if the purchaser completes a company-guided tour of the property within one year of the date of purchase and fills out a refund form with the details of how the property was misrepresented, and a further provision that the purchaser will be entitled to a deduction for the property visit at the conclusion of all payments if the aforesaid tour is taken and if the purchaser signs a form stating he has seen his property, it is as represented, and he is satisfied with his property. These provisions are alleged to be unfair because the purchaser is required to incur the expense of traveling to the property to take the tour and (1) it is often not possible for purchaser to see his land, and (2) it may not be possible for the purchaser to ascertain if the property was misrepresented at the time of sale, or whether or not he is satisfied with his property.

COUNT XXXI

Respondent represented to previous purchasers and others that the value of lots purchased from respondent had increased significantly since the time of purchase, when said lots have not increased significantly in value.

COUNT XXXII

Respondent caused purchasers to pay substantial sums of money toward the purchase of property in advance of the passage of title,

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retained the money and failed to offer refunds or refused to refund the money, when the lots were of little value as investments and of little use as homesites.

COUNT XXXIII

Respondent utilized a provision whereby defaulting purchasers forfeited all payments, and after receipt of such payments, respondent failed to offer to refund or refused to refund all payments in excess of respondent's reasonable damages caused by the purchaser's default.

COUNT XXXIV

Respondent (1) induced members of the public through unfair and deceptive acts and practices to pay substantial sums of money toward the purchase of respondent's lots, and (2) continued to retain substantial sums in excess of its reasonable damages as a result of [7] the unfair forfeiture provision in its contracts; this practice restrains competition between respondent and its competitors.

COUNTS XXXV AND XXXVI

The aforementioned unfair acts and practices have the tendency and capacity to mislead and deceive the purchasing public, are to the prejudice and injury of the public and respondent's competitors, and in violation of Section 5.

On May 23, 1975, respondent filed its answer to the complaint admitting generally certain jurisdictional allegations, but denying all allegations of unfair or deceptive acts or practices. Respondent also set forth thirty-two affirmative defenses to the complaint.

Complaint counsel requested and was permitted extensive discovery following issuance of the complaint. Such discovery was limited to the period subsequent to January 1, 1968 (Order Granting In Part Respondent's Motion To Quash Complaint Counsel's Subpoena Duces Tecum, August 18, 1975, pp. 8–9; Order Granting In Part Complaint Counsel's Motion For Reconsideration And Denying Request For Permission To File Application For Review, September 9, 1975, p. 2). By order of August 11, 1976, the undersigned denied respondent's claims of a self-evaluative privilege for certain intracompany documents subpoenaed by complaint counsel and examined by the undersigned *in camera* (Order Ruling on Respondent's Claim of Privilege For Certain Internal Corporate Records), which denial was affirmed by the Commission by order dated October 5, 1976. On

November 18, 1976, the undersigned was permanently enjoined from delivering these documents to complaint counsel, *Horizon Corp.* v. *FTC,* 10 Court Decisions-FTC 512, CCH Trade Reg. Rep. par. 61,155 (1976–2 Trade Cases). Thereafter, the Commission sought enforcement of the subpoena. The Court of Appeals for the District of Columbia subsequently ordered production of the documents in question, sustaining the Commission's determination that the so-called self-evaluative documents were not privileged from discovery *FTC* v. *Horizon Corp.,* No. 77–1385, Feb. 28, 1978. These documents were not received by complaint counsel until after the case-in-chief was completed. Complaint counsel was given permission to offer the documents when received, and they were offered and received in evidence during rebuttal hearings (Tr. 16395–415).

During the trial of this matter respondent objected to the receipt of any evidence occurring prior to March 11, 1972, or three years prior to issuance of the complaint herein based on the three-year limitation in Section 19(d) of the Federal Trade Commission Act (15 U.S.C. 57(b)). This objection was overruled; however, proof was limited to acts, practices and transactions occurring subsequent to January 1, 1968 (see Tr. 505, 652–58, 898–99, 6177).

Complaint counsel began the presentation of the case-in-chief on March 10, 1977 in Washington, D.C. (Tr. 442), and continued through August 1977 with hearings in Houston, El Paso, Albuquerque, Phoenix, Tucson, Denver, Chicago and Washington. Complaint counsel presented 91 witnesses, including 36 customers, 20 former sales personnel and several real estate brokers, company employees, utility company [8]employees, city and state planners, experts, and approximately 800 exhibits (Tr. 442–7844).

Respondent began its defense on February 13, 1978 in Houston, Texas (Tr. 7910) and continued through June 16, 1978, when it closed in San Diego, California (Tr. 16088). Respondent presented nearly 1600 exhibits and 129 witnesses, including customers, residents of its properties, sales representatives, real estate and construction experts, county officials, its employees and management personnel, and several experts on numerous subjects. Following the close of respondent's defense, complaint counsel presented nine witnesses in rebuttal in New York City on August 28 and 29, 1978 (Tr. 16094–16702); four witnesses testified for respondent in surrebuttal hearings held in Albuquerque on September 11, 1978 (Tr. 16704–807).

The record closed on October 10, 1978 (Order Closing The Record For Reception of Evidence, October 10, 1978). Pursuant to requests filed by the parties, the administrative law judge requested and the Commission ordered that the parties be given until February 12,

1979 for the submission of Proposed Findings of Fact and Conclusions of Law and until April 12, 1979 for the filing of reply memoranda. The parties have filed their proposed findings, reply findings, proposed order and supporting memoranda. Oral argument was held on May 25, 1979. The date for filing this Initial Decision was subsequently extended by the Commission to September 17, 1979 (Order by the Commission dated August 1, 1979).

This proceeding is now before the administrative law judge for decision based upon the complaint, the answer, pleadings, testimony and other documentary evidence of record, proposed findings of fact and conclusions of law and legal authority submitted by the parties. These submissions have been given careful consideration and, to the extent not adopted herein in the form proposed or in substance, are rejected as not supported by the record or as immaterial. All motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings of fact and conclusions of law submitted by the parties, the administrative law judge makes the following [9]findings of fact and conclusions and issues the Order set out at the end hereof.[1]

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[1] References to the record and other material are given in parentheses, and the following abbreviations are used:

F.	–	Findings of this Initial Decision followed by the finding being referenced.
Tr.	–	The transcript of record in this proceeding followed by the page being referenced.
CX	–	Commission Exhibit followed by number of exhibit being referenced.
RX	–	Respondent Exhibit followed by number of exhibit being referenced.
CPF	–	Complaint counsel's Proposed Findings followed by the finding number being referenced.
CRB	–	Complaint counsel's Reply Brief followed by the page number being referenced.
RPF	–	Respondent's Proposed Findings followed by the finding page being referenced.
RRB	–	Respondent's Reply Brief followed by the page number being referenced.

Findings of Fact

I. Description of Respondent and the Nature of its Business

A. Corporate Background

1. Respondent Horizon Corporation, "Horizon," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 4400 East Broadway, Tucson, Arizona (Ans. Par. One). Respondent was organized on May 11, 1959 as Horizon Land Corporation. The name was changed to Horizon Corporation on March 4, 1968 (CX 56L, 67B).

2. Horizon, from its aforementioned principal place of business, operates and controls the acts and practices of its subsidiaries, and derives pecuniary and other benefits from their acts and practices. These subsidiaries are engaged in the sale of undeveloped land in limited areas of the United States. Some of these subsidiaries are, for example, Horizon Corporation of Connecticut, Horizon Corporation of Indiana, Inc., Horizon Corporation of Kansas, Inc. (CX 70E, G, I). There has been no real contention during this proceeding that Horizon was not responsible **[10]**for the acts and practices of these subsidiaries (Ans., Par. Two; CX 68–74, 110A, D, E, 211A–Z–231, 103A–Z, 168–182, 229–341, 60A, C, N, S).

3. Horizon is now, and for sometime past has been engaged, directly and through its subsidiaries, in the business of acquiring undeveloped land, subdividing said land into lots, and advertising, offering for sale, and selling said lots to the public (Ans., Par. Three). Sales of undeveloped lots have been made throughout the United States through sales offices located in most of the states. In 1973 Horizon operated as many as 67 sales offices (CX 61V). Horizon has also offered for sale and sold undeveloped lots to the United States armed forces located abroad (CX 112D; Tr. 10527–535); sales have been made in areas such as Guam (Tr. 6033–34) and Canada (CX 949A–G). In addition, Horizon has been engaged in home building and in the sale of homes and developed lots to builders and to the public (CX 66D, E, 67J). The sale of homes and developed lots has not been directly challenged in this proceeding.

4. Among the properties in which lots have been and are being offered for sale to the public by Horizon are the properties known as Paradise Hills and Rio Communities located in the State of New Mexico; Horizon City and Waterwood located in the State of Texas, and Arizona Sunsites and Whispering Ranch, located in the State of Arizona. The acreage of these properties is substantial. Most of these

properties are divided into numerous and variously named subdivisions (Ans., Par. 4; CX 195, 197M; RX 1541A).

5. Horizon usually sells the lots in its properties to purchasers who have not seen their land at the time of the contract of sale. Horizon utilizes standard form contracts, entitled "Agreement for Deed" and "Receipt of Deposit," whereby the purchaser generally pays monthly installments over a term of approximately eight years. According to the provisions of the contract, title to the lot remains in Horizon until final payment is made, at which time title passes to the purchaser. As to most of its properties, Horizon's only contractual commitment is to stake the lot and to cause a road fronting on the property to be completed within thirty days after the purchaser has completed his payments or approximately eight years from the date of signing the contract, whichever is later. The contract provides that the purchaser pays interest to Horizon during the contract term on the unpaid balance owing under the contract. As to some of the properties, the purchaser is responsible for making a yearly payment of a specified amount to a community improvement association; the purchaser is also responsible for payment of taxes on the property. Both of these latter obligations commence at the time of execution of the purchase contract (Ans., Par. 5; CX 67F [SEC 10–K Report for fiscal year ending May 31, 1976]).

6. In the course and conduct of the aforesaid business, Horizon now causes, and for some time past has caused, its promotional materials, contracts and various business papers to be transmitted through the United States mail and other interstate instrumentalities from its place of business in Tucson, Arizona to its agents, representatives, employees, customers and prospective customers in [11]various other States and territories of the United States, and the District of Columbia. Horizon now maintains and operates, and for some time past has maintained and operated, places of business and has made substantial sales to purchasers in the various States of the United States and the District of Columbia. Horizon also places advertisements in newspapers and other communications media which circulate and/or transmit messages across state lines. Horizon maintains, and at all times mentioned herein has maintained, a substantial course of trade in said land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Ans., Par. 6).

7. In the course and conduct of the aforesaid business, and at all times mentioned herein, Horizon has been, and now is, in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of land (Ans., Par. 7; Tr. 6676–78; CX 67R).

B. Horizon's Properties

Paradise Hills

8. The first land which Horizon purchased, after its incorporation in 1959, was Paradise Hills (RX 199B). It was a barren stretch of undeveloped land northwest of the Albuquerque, New Mexico city limits (CX 196R; RX 1564). The initial purchase was of 8,500 acres (Tr. 14378–79); subsequent purchases brought it up to its present size (Tr. 14435). As of May 31, 1976, the Paradise Hills project consisted of approximately 13,000 acres of improved, semi-improved and unimproved land located in Bernalillo County, New Mexico. It lies to the west of the Sandia Mountains on the western bank of the Rio Grande River. The direct distance from the heart of Albuquerque to the southeastern corner entrance of the tract on May 31, 1976 was approximately 7 miles and the direct distance from the northwest city limits of Albuquerque was approximately 3 miles. Approximately 9,000 acres of the project had been sold as of May 31, 1976; 185 acres contained a regulation size 18-hole golf course and country club; the balance has been or will become available for sale. Development included 917 homes, 138 apartment units and 3 industrial plants employing approximately 500 people (CX 67Z–2 [SEC 10–K, May 31, 1976]). The present population of Paradise Hills is approximately 4,000 (Tr. 2843, 10041, 10291).

9. Several thousand acres of Paradise Hills were sold in large acreage parcels in the 1960's (Tr. 14392–93, 14431). At the same time, 1,300 acres were sold to an Albuquerque developer who built 600 homes in the core development area (Tr. 14431–32). Sales of acreage parcels have been insignificant since 1970 (RX 1535B; CX 312N). Since 1970 there have been few sales of Paradise Hills land to consumers (RX 1535), either on-site (Tr. 10439, 11015), or off-site (Tr. 8495, 8893, 11480, 11653, 12102). The only sales now consummated are of developed lots to builders by Horizon (Tr. 10291).

10. Approximately 200 homes were built in 1977 (Tr. 9984), and projections for 1978 and 1979 are for about three times that number in each year (Tr. 13963, 9984–85). In March 1978 local [12]builders were already committed to purchase 175 developed lots from Horizon in the next month (Tr. 10345, 13963). There is some industrial development going on at Paradise Hills industrial sites which consists of non-rail served industrial land (Tr. 10814, 19838). There is also a shopping center, an elementary school, several churches, a library, and various community buildings (CX 231B). Horizon has invested over $20 million in the development of the core area of Paradise Hills, not including the purchase of the land, of which over

$11 million represents expenditures on housing (RX 1524B). Horizon now owns 1,000 acres of acreage and 3,500 acres in the core development area, none of which is currently being offered to consumers (RX 1535A; Tr. 10357, 10290, 14433, 14437).

Rio Communities

11. As of May 31, 1976, the Rio Communities project consisted of approximately 249,000 acres of improved, semi-improved and unimproved land located on both sides of the Rio Grande River and the town of Belen, New Mexico, which had a population of 5,000. The property ranges from 3 to 18 miles from Belen. Approximately 78 percent of the Rio Communities property lies in Valencia County and 22 percent in Socorro County. Rio Communities, 35 miles south of Albuquerque and the largest Horizon community in terms of acreage, blankets a land area larger than the combined cities of San Diego, Las Vegas and Philadelphia (CX 155C). By May 31, 1976 approximately 159,000 acres of the project had been sold. In addition, 75 acres contained an 18-hole golf course and appurtenant facilities, approximately 25,000 acres had been conveyed to property owners associations. The balance of the land has been or will become available for sale. Development on that date included 635 homes, 31 apartment units, a 139 space mobile home park, one industrial plant employing approximately 35 people, and an office and retail shopping area (CX 67Z–4 [SEC 10–K, May 31, 1976]). Rio Communities is primarily situated between the Rio Grande River on the west and the Monzano Mountains on the east (RX 1546; CX 214A, 225C), though Rancho Rio Grande, which consists of 14,000 acres subdivided into five acre parcels (RX 1539A), and 20,600 acres of unnamed property which has been subdivided into parcels ranging in size from 160 to 640 acres (RX 1539, 1546, 1529A), is located on the western side of the Rio Grande River.

12. The initial purchase of land for Rio Communities was consummated by Horizon in the early 1960's (CX 131). This purchase constituted 106,000 acres, and consisted of Rancho Rio Grande and the unnamed acreage on the west bank of the Rio Grande River, Rio Grande Estates, Rancho Rio Grande East, and the present development area (Tr. 14491; RX 1546). In the late 1960's Horizon purchased approximately 40,000 acres, which became Rio del Oro, which was subdivided into individual lots, a future core area, and several planned town center sites (Tr. 14491; RX 1540, 1541H, 1539A), and 11,000 acres which were subdivided into lots and designated as the Canyon del Rio subdivision (Tr. 14493). The final purchase, in 1972,

was of the 83,000 acre Tierra Grande, which has been subdivided into large tracts ranging in size from five to forty acres (Tr. 14495; RX 1539A, 1546). **[13]**

13. The population of Rio Communities as of mid-1978 was estimated to be between 2500 and 3000 (Tr. 10303). The developed core area contains approximately 700 homes (Tr. 9978). There are eleven more homes in Tierra Grande (Tr. 10580). The rate of home building has increased somewhat in recent years, and there is construction activity currently in progress (Tr. 9979, 10494, 11035–36, 10924–25). Facilities in Rio Communities include a shopping center (Tr. 10075), a car dealership (Tr. 10056–59), a country club and golf course (Tr. 10076), a fire station (CX 211B), a gas station (CX 211B), a motel (CX 211B), several churches (RX 1529C), a car wash (RX 1529C; Tr. 10060), and a modern industrial facility which is presently vacant (Tr. 10819). In addition, there are currently firm plans to construct a supermarket, liquor store, pharmacy, and restaurant within the core development area (Tr. 10060–61). In addition to the purchase price of the land, Horizon has expended over $14 million on housing and just under $14 million on community facilities, improvements, and maintenance in the core areas of Rio Communities (RX 1524C).

Arizona Sunsites

14. As of May 31, 1976, the Arizona Sunsites project consisted of approximately 47,500 acres of improved, semi-improved and unimproved land located in Cochise County, Arizona. The nearest entrance to the tract is approximately 12 miles south of the town of Willcox (population approximately 3,000); the farthest portion of the tract is approximately 31 miles distant from Willcox. The town of Douglas (population approximately 12,000) is approximately 55 miles south of the project, and Tucson is approximately 100 miles northwest. Cochise County is thinly populated and consists primarily of undeveloped land, grazing land and farm land. Approximately 35,000 acres of the Arizona Sunsites project had been sold as of May 31, 1976. In addition, 75 acres contained an 18-hole, par-three golf course and appurtenant facilities, and the balance is or will become available for sale. Development includes 377 homes and 28 apartment units, a community activities building and a number of retail shops. (CX 67Z4–Z5, [SEC 10–K May 31, 1976]).

15. The present population of Sunsites is approximately 1150 (Tr. 13041), living in approximately 400 homes in the development area and 35 homes located outside the development area (RX 1235R). The

residents of Arizona Sunsites are mostly retired (Tr. 13045; RX 79). There are four churches (RX 79), two parks and a recreational center (RX 79), a pool, two tennis courts (RX 79), a 61 unit mobile home park (Tr. 13852), an arts and crafts center and a library (RX 79), a post office (RX 1235Q), a bank, a grocery store, a filling station, a garage, a beauty shop, pub, cafe, auto body shop, and other commercial facilities (Tr. 13052–53). There is also a medical clinic at Sunsites and free ambulance service to the Wilcox Hospital (Tr. 13050–52). Horizon has spent over $7 million on housing, and over $4 million on improving and maintaining the Arizona Sunsites core development (RX 1524B). **[14]**

Whispering Ranch

16. As of May 31, 1976, the Whispering Ranch property consisted of approximately 19,000 acres of totally unimproved land in Maricopa County, Arizona, approximately 10 miles south of Wickenberg, Arizona, and approximately 36 miles northwest of Phoenix, Arizona. The property has been offered in unimproved 5 and 10 acre and larger tracts. An aggregate of 16,000 acres had been sold and 2,400 acres were available for sale on that date (CX 67Z–6 [SEC 10–K, May 31, 1976]). The overall tract consists of range land and varies in elevation because of its rolling, hilly nature which slopes from west to east with the highest portion of the property being approximately 2,200 feet and the lowest portion being approximately 1,800 feet above sea level. The soil in the area is generally of a coarse granular to sandy loam character. The vegetation is primarily southwestern desert type, namely cactus, yuccas and mesquite (CX 63Z–15 [*Prospectus,* Horizon Corp., February 26, 1969]). Whispering Ranch has no current development, with the exception of unpaved roads constructed by Horizon (Tr. 12717).

Horizon City

17. As of May 31, 1976, Horizon City consisted of approximately 87,000 acres of improved, semi-improved and unimproved land located at its extremes from 5 to 19 miles east of the El Paso City limits, and from 16 to 30 miles from the downtown section. Most of the land lies in El Paso County, with a minor portion in Hudspeth County. Approximately 60,000 acres of the project had been sold as of May 31, 1976; 159 acres contain a regulation size 18-hole golf course and appurtenant facilities; 110 acres were reserved for a lake; approximately 2700 acres had been conveyed to a property owners

association; and the balance has been or will become available for sale (CX 67Z–3 [SEC 10–K, May 31, 1976]).

18. Horizon City is located southeast of El Paso, Texas (RX 1545, 1146, 1145), a city of approximately 400,000 (RX 1557B). The initial 63,000 acres of Horizon City was purchased by Horizon in the early 1960's (Tr. 14443); subsequent purchases in the mid-1960's raised the total acreage to its current size (Tr. 14443). Horizon City currently consists of an existing core development area, nine platted subdivisions, 15,000 acres of acreage parcels, several parcels ranging in size from 24 acres to 4,000 acres which are reserved for potential future core areas, and several large parcels which have been donated to the Horizon Community Improvement Association (RX 1536, 1528, 1545, 1537).

19. Development in Horizon City through the 1960's was limited; at the close of the decade, fewer than 100 houses had been constructed (CX 13B, 218B; Tr. 9836). Currently there are approximately 1800 residents living in Horizon City and more than 650 homes (Tr. 9081; RX 209U). In fiscal 1977, 120 residential lots were developed in Horizon City and approximately 40 to 50 homes were built. As of mid-1978, about 200 lots were in the process of development and 20 homes were under construction (Tr. 9071–73). The core area also contains an 18 hole golf course club, a swimming pool, tennis courts, and the Horizon administrative offices. In the industrial park, which adjoins the core area, there are approximately 11 commercial and industrial establishments with a total employment of about 800 people (Tr. 9081, 14190–91). Approximately 180 of these **[15]**employees are residents of Horizon City (Tr. 9081). In early 1978, construction began on an 18,000 square foot shopping center, of which all but 600 square feet had been leased prior to the beginning of construction. The leases are for a doctor's office, supermarket, hardware store, ice cream store, ceramic shop, gift shop, florist shop, fabric shop, a ladies' and mens' clothing store, liquor store, barber shop, beauty shop, drug store, savings & loan office, cocktail lounge, restaurant, real estate office, an office of the El Paso County Water Authority, dentist's office, a law office, and an accountant's office (Tr. 9082, 9863–65). Over $17 million has been spent by Horizon in the construction of housing, and over $15 million has been spent on public facilities, improvements, and maintenance in the core development area of Horizon City (RX 1524B).

Waterwood

20. As of May 31, 1976, the Waterwood project consisted of 25,000

acres of improved, unimproved and semi-improved land located approximately 19 miles from Huntsville, Texas, which has a population of approximately 15,000, and is 100 highway miles north of Houston. A portion of the property is located in San Jacinto County and a portion in Walker County. The property fronts on the northwest portion of 90,000 acre Lake Livingston and includes approximately 12% of the total lakeshore line. Portions of the property are offered fully improved with paved streets and utilities, and other portions are offered with deferred improvements. By May 31, 1976 approximately 1,200 gross acres of the project had been sold; approximately 1,500 acres had been conveyed to the Waterwood Improvement Association; and the balance has been or will become available for sale.

Initial development was primarily concentrated in a 1,000 acre area which includes central sewer and water service, electricity, telephone service, approximately 17 miles of paved roads, a 48 unit motel, a restaurant, a recreation center, a visitors' pavilion, an equestrian center, a marina, a barbecue and picnic area, a park with a swimming pool, and a country club complex. The country club complex contains an 18-hole championship golf course on 169 acres and a 38,000 square foot clubhouse containing dining, convention and banquet facilities. Adjacent to the clubhouse are 36 hotel units, four tennis courts and three swimming pools. In August 1975, the property contained 11,160 lots of which 2,639 had been sold (CX 373H). As of May 31, 1976 there were 54 homes complete or under construction (CX 67Z–6 [SEC 10–K, May 31, 1976]).

21. Lake Livingston, a fresh water lake constructed by the Trinity River Authority in 1971 (Tr.7934), has a shoreline 450 miles long (RX 1548B; Tr. 7934, 7985). The emphasis in the development of Waterwood has been on resort and second home use (Tr. 14525). There are presently approximately 120 homes in Waterwood (Tr. 8024). Seventy of these homes were constructed within the last two years (Tr. 7990). As of the spring of 1978, approximately 40 or 50 homes were under construction (Tr. 7961–63, 8024). Approximately 60 or 70 of the already constructed homes are full-sized homes, used either as second homes or primary homes (Tr. 7960; RX 1037, 1938, 1051, 1057, [16]1059, 1092, 1904, 1095). The second major classification of homes are the "weekenders," generally smaller homes on smaller lots which are intended to be used as weekend resort homes (Tr. 7960; RX 1548).

22. Of Waterwood's 25,000 acres, 7,000 or 8,000 acres have been subdivided (Tr. 14520). Of the approximately 7,000 acres which have been subdivided, 30 percent has been planned as open space (Tr.

7920, 7957, 7995). One thousand lots have been fully developed with all utilities extended to them, as of September 1976 (Tr. 7958–59). Horizon has spent over $3 million on housing at Waterwood and over $27 million on facilities, land improvements and general maintenance (RX 1524C).

C. How Sales Are Made

23. Horizon began sales of undeveloped land in 1960. Its first purchase of land was Paradise Hills in July 1959 (CX 131C; RX 199B); the last purchase of land was March 1972 when the Waterwood property was purchased (CX 131C). Total acres of land purchased by Horizon from 1959 through 1972 amounted to approximately 432,000 acres (CX 131C, D). By August 1975, Horizon's properties totaled 356,312 lots, of which 277,890 had been sold (CX 873J). Sales of undeveloped land for the five years, commencing June 1, 1969 to and including May 31, 1974 totaled $369,740,000, as follows:

1970	$ 57,103,000
1971	$ 84,289,000
1972	$102,267,000
1973	$ 82,774,000
1974	$ 43,307,000

(CX 66H, 61N, 62Q)

As of May 31, 1973, contract receivables on land sales totaled $192,782,000, representing contracts on which 36 percent of the aggregate sales price had been received (CX 61G, R).

24. By 1973 Horizon had 67 sales offices (CX 61V, 258; see also Tr. 4047). The total number of sales representatives employed by Horizon as of May 31, 1971 was 1,443 (CX 64D); as of May 31, 1972, Horizon employed 1,651 sales representatives (CX 65E). A sales trainer in the Philadelphia office testified that she trained hundreds of sales representatives during her employment as a trainer of about two and one-half years (Tr. 16420–23, 16425). One regional manager testified he supervised 25–35 sales representatives as a district manager and up to 100 sales representatives as a regional manager (Tr. 4498; see also Tr. 6152). One zone manager (Horizon had several sales zones - Tr. 8993–95, 9007) testified that he had 500 sales representatives within his zone at any one time (Tr. 2087). In a motion to quash a subpoena *duces tecum* issued at complaint counsel's request, it was asserted by Horizon that its Payroll

Department had approximately 60,000 terminated sales representatives' records on file (Memorandum In Support Of Motion To Quash Complaint Counsel's Subpoena Duces Tecum, filed July 25, 1975, p. 53; attached Affidavit of George C. Larsen, Director of Sales Administration, Horizon Corporation, dated July 22, 1975). **[17]**

25. It appears clearly from the record that sales representative turnover at Horizon was substantial (Tr. 2133, 3711, 6152, 16425–26). Sales representatives who remained with Horizon for more than a few months were promoted to a sales trainer's position or a sales manager's position (Tr. 1848–49, 1901–03, 2093, 2130, 2142, 2306–07, 3503–05, 3708–09, 3751, 4351–52, 4362, 4497, 4518, 4531, 4619–20, 4653–54, 16422). The sales representatives were compensated on the basis of a commission on sales, usually 8%, and the sale managers, district managers and zone managers received salaries plus overrides on sales by those sales representatives under their supervision (CX 66C, 157, 180N, O; Tr. 9018, 1850, 1877, 1910, 2142, 3506, 4368, 4500, 4765, 16097). The resulting remuneration of some of the sales representatives and the managers was substantial (Tr. 1910, 4500; CX 950D). The 45 to 60 sales representatives in the Fort Worth office were stated to have average earnings of $2,160 per month in 1970 or 1971 (CX 180M; Tr. 8764). One zone manager netted $189,000 in 1971 (Tr. 10376).

26. Horizon's policy and practice was to train its sales representatives before permitting them to sell land. The content and procedures of training evolved through the years. Prior to 1974 the training in most sales offices consisted of three to five days of in-class instruction, followed by one or more days of field training (Tr. 9125, 9493, 9586, 9808, 10177, 11619, 10388, 11654, 11304, 11447, 11230, 8846, 11572, 11619; CX 159J). In other offices training was less formal and less extensive (Tr. 2306, 3500, 3536, 4470, 4501, 6139). Where additional training was necessary to obtain a state license, the training program lasted more than five days (Tr. 16348, 10246–47, 3709). The training generally consisted of the history of the company, the different properties of the company, the TBA maps and the unit maps of the properties, and how to write the contracts (Tr. 2094, 1917, 4532, 4588, 4621–22, 16097). The training included how to use the presentation manual, and the locked-in growth pattern of Horizon properties (Tr. 2095–96, 1918–23, 1929, 3709, 4355, 16299–300, 16,488).

One description of the in-class training during the early 1970's is as follows:

A. We had three days of training and then on Saturday we had a half day test. We got there at 9:00 o'clock and it let out at 12:30.

Q. What was involved in the training?

A. Well, there was a general background on Horizon Corporation, their [P]rinciples, how they wanted you to sell the property, what Horizon was made of. Then we went into contracts, proper application of them, federal property report[s]. We had our TBA maps explained to us. We had our unit maps explained and we had the general background of the areas which we would be selling in.

(Tr. 8672–73) [18]

Following the in-class training, sales representatives accompanied the trainer or one of the managers on several sales presentations for field training. The field training, as described by a sales representative in Denver, was as follows:

We were field trained by the individual salesmanager or his assistant. [The field training consisted of] mostly observation for a couple of days and then actual sales presentation[s], followed by a critique.

(Tr. 11447–48; see also Tr. 4382, 4588)

27. In addition to the training of sales representatives, Horizon instituted training programs for managers and prospective managers. Prior to the institution of formal management training programs there had been quarterly zone meetings at which company officials would enunciate company policies to the managers on the local level (Tr. 13338–41). Beginning in mid-1971 these zone meetings were supplemented by formal training programs which were held in Tucson (Tr. 8980, 12792, 13341–42, 11019, 11245–46), and included a visit to each of the Horizon property sites (Tr. 12792). There were initially two types of management training programs, one for district managers and one for sales managers (Tr. 8980, 8989). The training sessions lasted for approximately two weeks (Tr. 12759, 8987; CX 103Z278–Z279). The district manager and sales manager training programs continued for several years, during which time more than 100 potential managers passed through the programs (Tr. 8990).

A third form of management training began in late 1971, the Sales Office Manager Recruiting and Training program ("SOMRAT") (Tr. 13542–44). This program also included visits to the properties and presentations by company officials (Tr. 13542–44, 4353–54, 4504). The SOMRAT program was in operation for approximately two years, during which time 200 to 250 potential managers were trained (Tr. 11519, 13542–44).

28. Horizon utilized newspapers, magazines, radio, television, outdoor and direct mail advertising services. Expenditures for these services were as follows: For the year ending-

May 31, 1971 - $1,579,807
May 31, 1972 - $1,875,996
May 31, 1973 - $2,391,636

These expenditures do not include costs for promotional materials and services rendered by outside suppliers, including advertising agencies, for the production of any materials except newspaper inserts used in 1973 (CX 93).

29. The promotional materials used by Horizon were generally conceded to be factually accurate (Tr. 678–79). The Horizon legal department verified all factual statements in promotional materials before permission was given to use such materials (Tr. 12565–66, 12617). There were approximately 14 states that required all advertising and promotional materials to be approved prior to the time such materials were used in these states. (Tr. 12559). The [19] requirements varied from state to state (Tr. 12461–62). Some minimal number of states also required prior clearance of all sales representative's material (Tr. 12618). Horizon took measures to make certain that no advertisement or promotional piece was published or used without having received prior approval from the states in which advertisements or materials appeared in compliance with state requirements (Tr. 12646, 8582, 8597, 4109–13, 13091, 13096–98).

30. Many of the states in which Horizon has conducted business have required that Horizon register its lots with the state. The registration document contains general information about the organization who is selling the property, a copy of the plat of the property, documents showing any encumbrances affecting title, and information about the existence of roads, utilities, and prices of the lots. Some of the states inspect the property being offered for sale. Often, as part of the registration process, Horizon was obligated to submit to the state all advertising and promotional materials, including sales training manuals and the individual promotional materials used by the sales representatives (Tr. 12571, 12616–18).

31. The Office of Interstate Land Sales Registration ("OILSR"), which was created as an office in the Department of Housing and Urban Development pursuant to the Interstate Land Sales Full Disclosure Act of 1968, in December 1973 established requirements for advertising and promotional materials used in the interstate sale of land to assure that the materials are not false and misleading or deceptive (15 U.S.C. 1701–20 (1976)). The evidence of record indicates that Horizon complied with these regulations (Tr. 12553–57, 13272).

32. Through most of the relevant time period, Horizon utilized

three contract documents at the time of sale. These documents consisted of the Agreement for Deed (CX 142), and two related documents, the Receipt of Deposit (CX 139) and the Property Visit Credit Certificate ("PVCC") (CX 134). At the time of purchase the Receipt of Deposit is filled in by the sales representative and signed by the customer. This document recites that the sales representative has received a downpayment, that the customer has received the federal and state property reports, as appropriate, and it identifies the lot or lots being purchased by the customer (RX 4–6). Several provisions from the Agreement for Deed are reprinted verbatim on the Receipt of Deposit (*e.g.,* RX 4–6). At the time of the sales presentation the customer also signs a blank copy of the Agreement for Deed. In Tucson, following the confirmation procedures utilized by the company (Tr. 13395–97), the Agreement for Deed is executed by an authorized Horizon official (RX 1–3), and a completed copy of the Agreement is returned to the customer in his important document package (Tr. 12890, 13405). The third related document, the PVCC, recites the Horizon guarantee and the Horizon property visit credit allowance, and is mailed to the customer in the important document package (RX 23–24; Tr. 12890). Upon visiting the property, a customer may sign the PVCC, have it validated by Horizon and receive a 5% credit against his purchase. **[20]**

In recent years, two changes were made in the form of the contract documents. After the Office of Interstate Land Sales Registration regulations changed in 1973 and required the receipt for the property report to be included as the front cover of the property report, the Receipt of Deposit was discontinued and the contract was revised into a single document entitled Contract for the Purchase of Land (RX 979–84). Beginning in 1974, the PVCC was replaced by the Property Visit Acknowledgement ("PVA") (RX 61).

The customers received, either from the sales representative at the time of sale or in the important document package which each customer received within a few days or weeks subsequent to the sale, the Receipt of Deposit, the Agreement for Deed, the PVCC, the TBA and unit maps, the federal and state property reports, and other documents.

33. Under the Agreement for Deed between Horizon and the purchaser, Horizon agrees to issue a warranty deed within 30 days after the purchaser has completed all payments, and within 30 days after receiving final payment, or eight years from the date of the agreement, whichever is later, cause a road fronting the property and connecting the property with a county, state or federal road system to be completed. The purchaser agrees to pay taxes on the

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property and also all improvement association assessments. Upon failure of the purchaser to make payments according to the agreed-upon schedule, Horizon may take possession of the property and retain all sums paid as liquidated damages. The agreement also provides that there is no agreement or understanding between the parties except as expressly set forth in the contract (CX 142, *for example*).

34. The Receipt of Deposit provides the purchaser with an exchange privilege. Horizon agrees to accept the purchased property in trade, applying the full principal paid, for any other available land, except land within a designated building area, which is, at the time of the exchange, equal to or greater than the original price of the traded property. In addition, upon the agreement to buy or commence construction of a home within 90 days and complete construction within 120 days thereafter, the purchaser may exchange one single family residential lot for a similar size lot in any building exchange area within the same development, so long as one is available, without any increase in the price of the land, the purchaser to pay for the cost of the then current utility costs to the lot line and street improvement costs at the time construction is to commence, or such costs shall be included in the cost of the house if purchased from Horizon (CX 139, *for example*).

35. Sales representatives were allocated specific inventory to sell on each sales call (Tr. 1877–78, 2077, 2084–89, 2167, 16473). Sales representatives were trained to preselect the lots for presentation to a prospect and not to give the prospect choices or alternatives: "We made the decision for him" (Tr. 1878; see also Tr. 2085; CX 180Z–4, Z–19, 157M, 158 O, P, 160Z–1, 161Z–3, 163K, P, 178 O). Sales representatives were trained to "[A]void letting your prospect gain control by moving you to another Unit, Block, or Lot. Simply tell them that the reason you selected this Unit, Block, and Lot over others was because of these features, and repeat them" (CX 161Z–3). Property designated as commercial or multi-family was **[21]**scarce so most salesmen had to sell lots designated as residential (Tr. 1935). Several different sales methods were used. These sales methods included dinner party or group sales, fly-in sales, in-home sales, and on-site sales.

(1) *Dinner Parties*

36. In the late 60's and early 70's, a substantial portion of Horizon sales were obtained through the medium of group sales, primarily at dinner parties to which company sales representatives

invited prospective and past purchasers selected from lists of names developed by Horizon (CX 63E, 537A–C; Tr. 16448–49). Invitations were usually by mail and prospects replied by return card (Tr. 3499). The dinner parties were held in quality hotels or motels (Tr. 4464, 4469, 4471). A very nice dinner paid for by Horizon was served to the husband-and-wife couples attending the party (Tr. 4469–70, 4471, 3500, 4769; CX 538). Sales representatives sat with the couples at a table during dinner to "warm up to them, be friendly, casually throw out a few words about Horizon during the dinner, build-up a rapport" (Tr. 4471, 3499, 4764). After dinner, a speaker would say a few words, a film would be shown - the Merv Griffin film or the Leif Erickson film, and the speaker would come on with an intensified sales presentation (Tr. 1321–29, 1100, 4471–72, 4486, 4764, 4767–68, 5962, 6450–52, 6472, 6543, 16473–74; CX 538). Thereafter, the sales representatives would try to close a sale (Tr. 4472, 3500–01, 4786, 5962). If the sales representative could not close the sale, there was a technique whereby another sales representative, a "harder closer," would take over, a "T.O." (Tr. 4472–73, 4763, 4765–66, 5980–81). Some Horizon sales offices held dinner parties five to seven nights per week (Tr. 4474, 3499, 4765), and up to 80 couples attended these parties on any given night (Tr. 3500, 1321, 4768).

There were other group sales where a sales office would periodically hold a gathering where sales representatives would invite their customers, or prospects to whom they had made previous presentations, or other prospects referred by them (Tr. 1188–89, 1117–19, 1524, 2322; CX 636Z–4, Z–5, 528).

(2) *Fly-ins*

37. Some of the Horizon sales offices conducted extensive sales programs involving fly-ins. The persons participating in fly-ins were usually customers who had previously purchased property from Horizon and were visiting the property (Tr. 4364–65, 16221, 16534, 16542; CX 636Y, Z). The property visitation credit which Horizon offered its purchasers could theoretically offset some of the travel expenses (Tr. 16214–15). The sales program during the fly-in was to sell additional property to the customers, or to use the customer's existing equity in Horizon property to upgrade the customer's property, or to exchange the property previously purchased for additional property, effecting additional sales in the process (Tr. 16449–50, 16469–72, 4365). While customers were on the fly-in trip, efforts were made to keep the customers busy all the time and to separate from the group those persons who might cause problems in

making sales during the trip (Tr. 16471, 16543–44). Special inventory was assigned for fly-in trips, and follow-ups were made if [22]sales were not finalized during the trip (Tr. 16472–73, 16544). Contracts sometimes were made out in advance of the fly-in trip to cover the specific property that would be offered to a customer during the trip (Tr. 16450, 16479).

During the fly-in, the on-site sales representative took the customer out to see the customer's existing purchase and also to see the new property. On return to the on-site sales office the customer was escorted into a closing room and asked if the new property was satisfactory. The customer was then asked to sign a pre-written contract:

> Yes, sign here, press hard. There are four copies, and you hand them the pen. It was very cut and dried and very quick. We landed a lot of people (Tr. 16470).

There were "T.O." sales representatives in the closing rooms, and commissions were split among the on-site sales representative, the fly-in sales representative and the "T.O." sales representative (Tr. 16480). Jing Jo Yu, a Korean American woman who purchased 15 lots in Rio del Oro, gave a vivid description of the sales pressures utilized in the fly-in closing rooms (Tr. 6353–60; see testimony of Elsie Colon, a customer who also participated in a fly-in property visit Tr. 16215–22, 16245).

(3) *On-Site Sales*

38. Horizon maintains sales offices at each of its land projects (CX 69X, 61V). As of May 31, 1974, Horizon stated that approximately 5% of its sales were made on site (CX 66C). Many of the sales on site were made to customers who were visiting their property pursuant to the property visit credit offered by Horizon (Tr. 1539, 1830–33, 5033–34, 6360, 16478–80). Some customers traded lots while visiting the property (Tr. 5161, 16215–22, 1201).

(4) *In-Home Sales*

39. Sales of Horizon land was effectuated primarily through sales representatives' visits to individual homes by appointment through leads obtained from various kinds of advertising and from personal contacts (CX 66C; Tr. 6250, 6258, 6335, 888–93, 1471, 4992, 16262, 4930), through telephone calls (Tr. 816, 4930, 1850–53, 2141), and cold canvassing (Tr. 4670, 4675, 4690–92, 4712–14, 4718, 4722). Horizon has stated that over 50 percent of its sales were to existing customers or to contacts referred to Horizon by existing customers

(CX 66C). Sales to existing customers were referred to as "reloading" a customer; *i.e.,* increasing the amount for which a customer was obligated. Sales representatives were trained at reloading and were very successful at this sales technique (Tr. 2000, 2162, 2314, 3528, 3726, 3745, 3770, 3777, 3942, 4363–64, 4515, 4566).

The sales presentation in the home usually consisted of a presentation from a standard presentation manual (Tr. 1856, 1918, 3709–10, 3716, 3762–63, 4355, 4534, 16461). Additionally, TBA and unit maps of the property, federal and state property reports, and **[23]**contracts were utilized, and sometimes a movie was shown (Tr. 2139–40, 2312, 4382–83, 4502, 4532, 4555, 4588, 4656, 4659, 16118; CX 101). The presentation generally followed a pattern of selling the company, selling land as an investment, selling the southwest, selling the nearby city, selling the development, selling the unit within the development, and then selling the specific lot or lots, a presentation one zone manager referred to as "funnelling" (Tr. 1933, 1923–24, 1960, 4551–52, 4657, 16431–32, CX 180H, Z–28, 778Z–10). The sales presentation varied to suit the occasion and the individual sales representative (Tr. 923–24, 2161–62, 2190, 3554, 4571–72, 4576, 4581, 4593–94, 4608–09, 4432, 4735, 4644, 4793, 1106, 1243, 9019, 9021–22; CX 947H).

Representations by sales representatives follow in a general way the training manuals and presentation manuals. Salesmen, however, often deviated from the standard presentation and added embellishments or adapted the presentation to best suit their own methods and needs. Some sales representatives testified that they were trained to use the standard presentation verbatim (Tr. 3503, 3505, 3709–10, 3716, 4355, 4407, 4534). Others used the standard presentation as a guideline or outline of the sales presentation (Tr. 9019, 9021–22, 4644). As sales representatives became more experienced and comfortable with their sales presentations, they relied less upon the standard presentation (Tr. 2047, 2049, 2161–62, 2190; CX 856A).

40. One witness, Larry Cervenka, gave a rather complete account of a sales presentation in the home:

Q. Mr. Cervenka, to the best of your ability, taking your time, would you kindly tell His Honor what your first personal contact was with Horizon Corporation?

A. Well, I got this phone call from a young lady and she said, invited me to a dinner and—

Q. (Interposing.) Excuse me. Can you establish a time when this took place?

A. This is in early evening, one day during a week day one evening, and said I was invited to a dinner.

Q. What year, sir?

A. This is in '71, 1971.

Q. Go ahead.

A. And anyway, I asked what's involved with the dinner? She said "Well, it would be a sales presentation at the dinner," and, or a movie on land in general, something like this. I said, "Well, I couldn't attend that." She said, "Would you like a free book on how to make money in land," or something like this. So, I said, "Sure." **[24]**

So, I think, I don't remember whether she called and then a salesman came by the next night, or whether it was that same night, but shortly, within the next day or so, somebody came by and brought me the book and it was just a little bitty book. I don't know how many pages, but it wasn't a real substantial book, and then this salesman, his name was John Cashier, he started talking about different investments, and he had a complete sales presentation there.

He had really professional-looking maps and brochures and had all of this in a file folder and a loose-leaf folder, you know, that opens up.

So, as he was talking to me, he would point out the appropriate page and point out certain charts or pictures, and whatever, and during the course of his talk, he showed in the past record of investments in stocks and investments in real estate and some other items, too. I don't remember, but mainly I remember stocks and real estate, and pointed out that land investment was a secure investment, and in some cases would yield a high rate of return, and then after this he pointed out the Southwest Area of the United States as being one of the fastest-growing areas of the United States and showed me how the population was moving to that area, and then what industries came in parts of that area, and then he started talking specifically about El Paso, and he explained how, because of geography of the city, the city could only expand in only one direction because of Fort Bliss on one side, the Border on the other, and then mountains and New Mexico.

So, he went and had a presentation on just what El Paso was all about, and then he described a particular—let's see, this was Horizon City Estates, and he showed where schools were planned to be built and shopping centers and showed me their—see, they had a land plan where, showed me where everything was going to go and showed me the various sections and then he got down to one section, Section 58; I think Lot 10.

He showed me the relationship to this section to the rest of the city and told me the price of the lots and I think corner lots were one hundred dollars more than interior lots, and he said at the time he was just selling, he just had two lots available, I think, a corner lot and then one middle lot, and if I remember correctly, he said **[25]**that this was—when he came to talk to me was about September or October of '71.

He said in December the prices were going to go up and that salesmen were given just certain sections to sell, that he couldn't guarantee that these same lots would be available for purchase at a later date because, you know, he just sold what his supervisor gave him, and he said—so, if I didn't buy it then, there was no guarantee I could have the lots at a later date or at the same price.

Before he had started talking, he showed me a property report and I glanced through it. I didn't read it really carefully, but I did notice the one item there about Horizon having a mortgage and if they were to default in their mortgage, this would not affect the purchaser of the lot.

That is about all I remember from the property report, but he gave it to me before he started talking.

Let's see. After he talked about the lot—I could tell from his presentation that he

really wasn't experienced at this, and he told me later he had just been working there for a few weeks and he hadn't made too many sales, so I guess I felt a little sorry for him and he seemed to know his presentation pretty well. He was just as nervous as I was, I guess, but, anyway, he—

I don't remember at what point I decided to buy, but he stressed several things that had appealed to me, like the exchange that Horizon Corporation had a deal where you can exchange any of their lots for any of their other lots that was equal to or greater in price and this was before you completed paying for the lot.

This appealed to me because he had told me about this development, that Waterwood, near Lake Livingston, and I could see the potential for that and I thought that would probably be a real good investment, but at this time Waterwood was not developed.

So, I couldn't buy anything there if I wanted to.

So, what I thought of in my mind, I would buy a lot and the equity I would build up in that lot, I would later trade for one at Waterwood. [26]

So, this is the primary reason I was thinking about all the time.

I would probably go look at it and if I didn't like it, I would at a later date trade for something at Waterwood because this really appealed to me.

Q. Now did he mention any rate of return or appreciation on land investment?

A. All right. In just land in general. O.K. He—I remember a figure of 20 per cent. This is, you know, when he was showing me, flipping through the pages of his presentation, 20 per cent.

I don't remember any figures from stocks and bonds or anything like that, but those I remember didn't really interest me, so I didn't remember what rate of return.

Q. All right, sir.

You mentioned that he said that corner lots were one hundred dollars more?

A. Right.

Q. Did he give any reasons for the lots—

A. (Interposing.) I believe they are a little bit larger than the middle lots.

Q. I see, sir.

All right. Now I take it that you did purchase a piece of property that evening?

A. Right.

Q. It was Horizon City Estates, is that correct?

A. Right.

Q. What was the cost of that lot, sir?

A. Thirteen hundred dollars.

Q. And what did—Were you married at the time?

A. No, I was single.

Q. How old were you?

A. I was twenty-one, almost twenty-two, I believe.

Q. I see. (Tr. 1823–28)

II. Representations made by Horizon in its Sales of Land

A. Basic Investment Theme

41. Both expressly and subliminally, the major theme that permeated Horizon's communications and representations to the public was the investment potential of its land—the promise of profits and financial security. This constant theme, implemented in numerous ways, was expressed in Horizon's advertising, its sales literature, its sales training manuals, its sales presentation manuals, and orally by its sales representatives. An intrinsic element of this basic theme was the representation that Horizon was going to make this investment potential happen.

A former zone manager, Theodore Stone, employed by Horizon from 1968 to 1974 and a zone manager for about four years of this time, was trained by Bill Cook. Bill Cook was first employed by Horizon in 1967 as a salesman; became a sales manager, division manager, zone manager, and from October 1970 was Vice President of Sales for Horizon (Tr. 1898–1904, 13512–23). Mr. Stone testified as to the training received from Bill Cook:

Q. What, if anything, did Mr. Cook say about the nature of the product you were selling?

A. Well, he was very convincing that it was a very good and sound investment and that it was going to make the investors an awful lot of money.

Q. What, if anything, did he say with regard to financial security?

A. That was a large part of the sales presentation that we were taught, how to create the need for the investment. People's need for financial security and retirement fund (Tr. 1918).

* * * * * * *

Q. What, if anything, did Mr. Cook [mean] when he made the statement that you made reference to earlier that you were selling money, not land?

A. Well, I particularly, from having a housing real estate background, I wondered how they could successfully sell this property unseen. And, that's when it was brought to my attention that there was a correct way to present it if you were going to accomplish that and an incorrect way if you weren't going to accomplish that. **[28]**

And, as I recall, and I have heard many times since that that everybody had a little green vein in palm of their hand and it ran across their arm to the heart, and he said it was called "greed," and, "if you mash it, you are going to be successful."

The emphasis was put on the financial security, the profit, the money that one would make by purchasing this land (Tr. 1922–23).

The following are representative techniques used by Horizon to convey its basic theme that Horizon land has tremendous investment potential:

(1) *National Advertising*

42. Horizon's national advertising program emphasized making money on land, Horizon land (CX 410C, 412A–C, 413A–C, 414A–C, 415D, 425F,G,H,T,U,X,Y, 252, 253, 254, 256, 258, 259, 261, 262, 263, 265, 266, 267, 271, 272). Many of the advertisements carried coupon offers of free books or brochures; for example, "How To Successfully Invest In Real Estate," "Make Money In Land," or "The New Southwest Potential Unlimited." A 1970 advertisement stated:

Small investors are making big money in low-cost growth land directly in the path of the Southwest's fast-growing liveable cities and suburbs.

* * * * * * *

Buying land is one of the few investments that give you an opportunity for tremendous profits starting with a modest investment. (CX 252, 255)

Another 1970 advertisement stated:

Horizon offers you tomorrow's good futures - today.

We sell planned land investments.

For growth.

For living.

For retirement (Advertisement in *Life* Magazine CX 254).

A January 26, 1971 advertisement in *Look* Magazine stated: [29]

Who put up a $100,000 community building before there was a community?

Horizon Corporation Community Developers that's who!

We build better communities that offer better investment opportunities.

* * * * * * *

When you're looking into land investment look to Horizon. (CX 256; see also CX 271, 272)

CX 258, an advertisement for the New York area, stated:

Nassau County land at 1950 prices.

* * * * * * *

Horizon Corporation, one of the nation's leading developers, believes that the Nassau Counties of tomorrow are in the making today, now, this very minute.

* * * * * * *

We guide our new communities through their initial stages. We put in roads, make utilities available in development areas, install recreational facilities, build residential and shopping areas, and create attractive proposals for industry. In short, we nourish the new community and help it to thrive and grow.

* * * * * * *

All things considered, the potential return from intelligent land investment presents a rare opportunity to the small or modest investor. (See also CX 259 - "For Sale: Wilmette land at 1950 prices;" CX 262 - "For Sale: West Hartford land at 1950 prices." CX 263 - "For Sale: Bergen County land at 1950 prices.")

CX 267, an advertisement depicting children, stated in part:

You want to do the best for their future. To provide an investment they can lean on. [30]

Something they could use for further education. Start a business. Found the family fortune..

Give them land.

The greatest investment. With the greatest profit potential. For any size pocket. And not only for the kids. You, too, can inherit the earth.

Today money loses value fast. But land's value is as progressive as its history. Traditionally, the best hedge against inflation.

CX 274 stated:

HORIZON CREATING OPPORTUNITIES

HORIZON CORPORATION, one of the nation's leading land developers, selects large parcels of land strategically located in the path of people and progress. On this choice property, we plan and create exciting new communities such as Paradise Hills and Rio Grande Estates in New Mexico; Arizona Sunsites; and Horizon City, Texas. It is almost inevitable that this land will rise in value as the population there increases, and as the population of big growth cities like Albuquerque and El Paso expand outward toward them.

We believe that we can prove to you that there is no other investment as good as land. Even a little bit can go a long way to patch up your future dollars.

CX 276, headlining "Money grows in land! Let Horizon prove it to you—show you how!", offered free books, "The New Southwest,

Potential Unlimited" and "How To Successfully Invest In Real Estate;" "They Could Make You Richer!" (See also CX 277, 278, 279.) CX 279 stated:

Ask Horizon to show you how you may grow dollars in land.

The price of land used for urban development has soared 90% over the past ten years compared to only an 18% increase for the Dow Jones stock index. [31]

This advertisement stated, in respect to the book "How To Successfully Invest In Real Estate":

Having it, reading it could well enrich your family's fortunes in the foreseeable future and for generations to come.

CX 282 offered a "New Investment Starter Kit," a free copy of "Make Money In Land." CX 283 offered this same book "Sold at Newsstands for 90¢! Yours Free! If You Mail This Coupon Now!" (See also CX 284)

CX 349A–C, an advertisement which received wide dissemination in 1972, headlined:

1962:	$400
1972:	$1,600
1982:	$(What's your guess)

This advertisement further stated that these prices are not "fictitious." "That's the track record of Horizon land to date."

CX 352A–D, widely disseminated in 1972, noted that "The land you buy is only as good as the company you buy it from":

Horizon isn't just waiting for expansion to catch up with us. On each of its properties Horizon is building planned communities. These aren't just aimless tracts. They're model communities planned for schools, industrial parks, golf courses and country clubs, swimming pools and apartment complexes, tennis courts, utilities, paved streets, churches and pleasant residential areas . . .

The advertisement also noted that Horizon had total assets of over $150 million, net worth of over $60 million and an inventory of land value of $240 million. It also stated that lot prices in ten years have risen from $395 to $1100.

Advertisements disseminated in 1973 and 1974 feature the building accomplishments at Horizon's properties, but have no investment claims (CX 351A–B, 354A–C, 355A–B).

The free booklets, offered by Horizon in national advertisements, emphasized the basic message that land is a great investment and it "COULD MAKE YOU RICHER":

How To Successfully Invest In Real Estate (CX 256–57, 279; Tr. 1970–76)

Make Money in Land, A Guide to Successful Investment (CX 454; Tr. 1976–77) [32]

The New Southwest, Potential Unlimited (CX 279, 455; Tr. 1977–79).

These books were also offered to the public through brochures and by other means (CX 340–42, 344–46, 294A–B, 357–58), and wide distribution to the public was apparently accomplished (CX 329–39). CX 295A–B, a mailer brochure offering free a copy of "How To Successfully Invest In Real Estate," stated that Horizon is "one of America's largest land and community developers."

43. Horizon also utilized radio and television spots. One radio advertisement mentioned that "Horizon Corporation is creating beautiful new communities" and "a Horizon land investment is an opportunity you won't want to miss;" it also offered the booklet "Make Money In Land" (CX 360; see also CX 361, 362). Some radio spots emphasized that Horizon is developing new communities in the Southwest for people who want a "solid, high-profit-potential investment . . . an investment you can depend on" (CX 375; see also CX 376, 378–79). An August 1970 radio spot stated that "Money Does Grow In Land . . . Horizon's research shows that a lot of land has increased in value as much as 48 times in the last 22 years. That's an average of about 20% compounded annually." (CX 386; see also CX 387, 392–94). Other radio spots stressed Horizon's $150 million in assets (CX 390–91).

In March 1971 TV commercials were stating "Invest In Some Land Now. It may be more than just a smart investment. It may become your *best* insurance policy," and offering booklets (CX 366). Another TV commercial stated that "The difference between just buying a little land and successfully investing in land is all a matter of who you do business with." This commercial stressed Horizon's assets and net worth (CX 367). TV commercials stating "Money grows in land" and that people are making money out of land, are also in the record (CX 369–74).

(2) *Training Manuals*

44. The various training manuals used in Horizon's sales offices instruct sales representatives to bring home the basic theme that Horizon is building better communities, that the corporation is financially strong, that money can be made in land, and that investment in Horizon land is a most desirable investment for the public (CX 189J–L, 157E, 258F–G, 259I–K, 160Z–1, 262V,Z–18, 163D, E, 165D,E,J,K, 615Z–11–Z15).

Representations that Horizon is a financially secure and a substantial New York Stock Exchange corporation is shown by the following statements in training manuals:

Starting in 1959, with $300,000, today, Horizon Corporation has assets totaling $250 million. It's a publicly owned company listed on the New York Stock Exchange (CX 157F, 1974 training manual, Northwest Zone; see also CX 178G Northwest Zone training manual 1973). [33]

Starting in 1959 with $300,000, today Horizon Corporation is the largest land developer in the Southwest with assets totaling over $100 million. It's publicly owned with over 4,000 shareholders (CX 956D, training manual used in early 1970's).

A telephone solicitation call used in a Horizon sales office stated:

Your name has been referred to me as a person that's interested in making money? Is that right? . . . If we can show you how to invest as little as $15 or $20 per month and double or triple your money over the next six to eight years, would this be something of interest to you?" (Tr. 2318–19; see also Tr. 2358).

The sales representative, at the beginning of the "Front Talk" designed for use just after entering a prospect's home, was instructed to tell the prospect that a reason for his visit was to find people, such as the prospect, "who stated that if they were reasonably assured of a profit, they would invest in land." (CX 615A,D, 956B, 180Z–1; see also CX 858A). After asking prospects whether they wanted "to make money," a positive response would elicit the comment that they were the type of people Horizon is spending millions of dollars on advertising to locate, "people who actually want to make money." (CX 160A,C). The training manual's front talk includes statements that Horizon made:

surveys and tests and studies to prove the worth of this land as investment potential for the modest investor or for homesites . . . . Real estate experts analyzed every facet as far as investment, industrial possibilities, closeness to major cities, population expansion, tax loads. . . . Millions of dollars were spent to develop golf courses, public utilities, as well as lakes and ponds. (CX 180Z–2, 157E, 158F, 163D,E, 165D,E, 905A–B,F, 956D).

One training manual stated that Horizon has "developed four thriving new and complete communities in Arizona, New Mexico and Texas" (CX 956C).

One point the sales representative was trained to establish is "Mr. Jones, are you interested in a sound investment" (C 180Z–3). "Mr. Jones, are you a man who wants to make money. How about you Mrs. Jones, do you want to make money" (CX 160C). The sales representative was trained to establish that land is one of the surest investment vehicles available today, and that Horizon land is much

more desirable than the average investment property because of Horizon's development concepts and technical knowledge (CX 180Z–4, [34]615Z11–Z15). A training manual used in Horizon's Northglenn (Denver) Colorado office advised the sales representative that "We sell our land as a VEHICLE for making money" (CX 856A).

One training manual used in the Philadelphia office during 1970 and 1971 instructed the sales representative to demonstrate to the prospect that a total investment of $2790, starting with a down payment of $240, would be worth $15,000 in ten years (CX 956V–X).

A training presentation used in the Philadelphia office started out by telling prospects about Horizon's success at Paradise Hills:

> Your original investors were offered an acre of land, in those days, for as little as $600. Today, a choice acre at Paradise Hills is worth $12,000 . . . . Well, tonight we're prepared to offer you an opportunity, in the same kind of project, the same rock bottom prices, and, in relation to future development, in the same time cycle. (CX 957B)

An answer for sales representatives to use to a possible prospect's objection of "How Do I Know This Will Ever Develop?" was "This is our business—we make things happen." (CX 959A)

A training manual used by a sales trainer in Horizon's Austin, Texas sales office stated that Horizon properties "must have inherently high investment potential by virtue of its location in a growth area near a growing city or because of a unique combination of climate, natural beauty, road and rail access, etc." (CX 778E). This same manual tells the sales representative to:

> Sell *Himself* on land as the *one* investment outranking all others in security and return, *and* on Horizon Corporation as offering the most *rewarding* of all land investments. (CX 778Z–10)

At the time the prospect assents to purchase the lot selected by the Horizon sales representative, the representative is instructed to state: "Mr. and Mrs. Smith, let me be the first to congratulate you on your decision. I know it will help assure your financial security." (CX 905K)

One closing technique - the "Lost Sale Close" - has the sales representative apologizing to the prospect for the failure to make clear "that you should make a nice profit on this land." (CX 180Z–11)

(3) *Presentation Manuals*

45. The sales presentation manuals used during in-home sales presentations carry the basic theme—Horizon's corporate history, [35]its substantial financial worth, its national and local recognition,

its development of beautiful communities in the Southwest, the need for financial security in the future, the historic rise in land values in the past, and the excellent investment potential of Horizon land because of its location in the Southwest near fast-growing cities and its predeveloped stage - "that land in the predeveloped stage, in a growth area, is where the greatest potential exists for future appreciation" (CX 194–197, 196Z6, 197Z–39). One message found in the presentation manuals stated:

People buy land from us to build homes for immediate use or to hold their land for potential future appreciation. This potential appreciation is keyed to the success of the master-planned communities Horizon is creating in the growing southwest (CX 196E–F, 197E–F).

Another message in the presentation manual stated:

Horizon Corporation has spent millions developing these communities. They didn't just happen. Horizon made them happen (CX 196Z7, 197Z9).

Earlier versions of the presentation manual carried messages, such as:

Horizon Corporation Offers Better Investment Opportunities by Building Better Communities . . . offering profit potential land in the Growth Southwest.

* * * * * * *

We guide these communities through their initial development stages—putting in roads; making utilities available in the building areas; installing recreational attractions such as golf courses; building homes and shopping centers; bringing in industry—all the necessary things to launch a community and attract the elements to enable it to thrive and grow (CX 194B, 195C).

These earlier presentation manuals had specific comparisons between land, savings accounts, life insurance and stocks and bonds. The comparisons show that land has the "Greatest Profit Potential" (CX 194K–O, 195P–Z2).

Testimonials in the presentation manuals include newspaper articles under the heading "Horizon Corporation is nationally known and acclaimed" (CX 195D—the Gold Presentation Manual). Some of these newspaper articles are: **[36]**

The Washington Daily News Assets over $67 million Horizon Corp. Enters Second Decade as Giant in the Southwest (CX 195D, 197G).

Boston Sunday Globe Horizon Success Story $300,000 to $51 million (CX 195D).

Dallas Times Herald New Horizons That Lure Investors (CX 195E, 197I).

Houston Chronicle Horizon City Adds Beauty to El Paso (CX 195E, 197H).

El Paso Tribune Judge Praises Horizon City (CX 195F).

El Paso Times Horizon Developer Wins Award (CX 195F).

Resolutions of praise from the States of Texas and New Mexico are included in the presentation manuals (CX 197K,L, 195F).

The manuals stressed not only the investment potential of Horizon land but also the success and worth of Horizon as a corporate entity. A TBA map used in sales presentations in the home stated the following about Horizon's corporate worth:

Horizon Corporation, founded in 1959, is a publicly owned company and is listed on the New York Stock Exchange with approximately 8,000 stockholders. The company and its subsidiaries are represented by sales offices in major metropolitan areas across the nation and abroad, which serve over 115,000 Horizon customers - January 1973 (CX 213A).

Other efforts by Horizon to assure that sales representatives were trained on Horizon's corporate success include a memorandum from Horizon's sales administration office, to all offices entitled "Horizon Corporation Management Rating" (CX 778 O). Through this **[37]** memorandum all offices were notified that Dines [A stock market newsletter] showed Horizon as number two on their list of America's Smartest Management on the basis of its rapidly increasing profits from land sales (CX 778P). This material was part of CX 778, a training manual used in Texas in the early 1970's. (See also CX 856A–B)

(4) *Celebrity Films*

46. The Horizon films, narrated by Merv Griffin and Leif Erickson and shown at dinner parties and sometimes during in-home presentations, emphasized the basic theme of the investment potential of Horizon's properties. The Leif Erickson film begins:

Hello, I'm Leif Erickson, I'm here to tell you about land investment, good living, and Horizon Corporation's communities. (CX 526B)

Leif Erickson gave examples of unusually high appreciation of land in various locations (CX 526D); he discussed population growth in the Southwest and in Albuquerque near two of Horizon's properties, the growth of Arizona and of El Paso with its locked-in growth and twin-plant concept. Mr. Erickson discussed Horizon's growth and its net worth. The script also included representations about Horizon's planning of its communities and the assistance Horizon gives the communities by building roads, making utilities available, installing

recreational facilities, building homes, shopping centers and bringing in industry. Leif Erickson concluded the film by stating:

I own some Horizon Land, along with more than 100,000 other people, because I am convinced that to buy land in the right place at the right time is a wise and rewarding thing to do . . . . Go ahead and get some land . . . It will probably be the best investment for your future that you ever made (CX 526T–V, [film script, "Investment Southwest"]).

The Merv Griffin film (CX 527) starts out as follows:

Hello. I'm Merv Griffin. I'm here to tell you about land investment, profits and the Horizon Corporation. (CX 527A)

The film script emphasizes the same points as the Leif Erickson film. Merv Griffin concluded his film presentation:

Investors in Horizon Land can be assured that they are investing in the very best type of profit potential land. Land which has been planned to attract tomorrow's residents, business and industries. (CX 527Z–17) [38]

* * * * * * *

I own Horizon Land, along with 70,000 other investors because there is no other investment as good as land and the Horizon Corporation convinced me that, to buy land in the right place at the right time is a wise and profitable thing to do . . . The Horizon Corporation's developments *are* in the right place and when buying land, *now* is always the right time . . . (CX 527Z–19).

(5) *Dinner Party Presentations*

47. Dinner party presentations used the cogenial atmosphere of a dinner party and the media of speakers, celebrity films and sales representatives to put across the theme that Horizon land had tremendous investment potential. The front talk (after being served dinner but prior to the film) used at dinner parties held in Denver included the following:

THE STORY OF HORIZON IS AN INTERESTING ONE. IT STARTED BACK IN 1957 WHEN A MR. JOSEPH TIMAN, WHO WAS CONSIDERED ONE OF THE MOST SUCCESSFUL REAL ESTATE ATTORNEYS IN THE UNITED STATES RETIRED TO TUCSON, ARIZONA.

INSTEAD OF LYING BACK AND TAKING IT EASY, HE WAS SO EXCITED BY THE GROWTH AND DEVELOPMENT TAKING PLACE IN OUR SOUTHWEST HE JUST HAD TO BECOME A PART OF IT.

THEREFORE IN 1959 HE FOUNDED THE HORIZON CORPORATION.

SINCE THAT TIME THIS PUBLICLY OWNED COMPANY HAS ACQUIRED OVER SEVEN THOUSAND SHAREHOLDERS, OVER 100 THOUSAND CLIENTS, AND HAS CONTROL OVER 460 SQUARE MILES OF LAND NEAR AMERICA'S

TOP GROWTH CITIES. STARTING WITH A NET WORTH OF JUST THREE HUNDRED THOUSAND DOLLARS, THE COMPANY NOW HAS ASSETS IN EXCESS OF 140 MILLION DOLLARS. I MIGHT ADD MR. TIMAN WAS THE CHAIRMAN OF THE COMMITTEE FOR SETTING UP A NATIONAL LAND DEVELOPMENT POLICY . . . A COMMITTEE WORKING VERY CLOSELY WITH THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

WE ARE DEVELOPING COMMUNITIES NEAR ALBUQUERQUE . . . THE BRAIN CENTER OF THE ATOMIC AGE. EL PASO . . . THE FASTEST GROWING CITY IN TEXAS . . . TUCSON . . . THE FABULOUS GROWTH CITY IN ARIZONA. WE *HAD* RAW LAND FOR INVESTMENT JUST NORTH OF PHOENIX, ARIZONA, BUT IT IS NO LONGER AVAILABLE. **[39]**

AS YOU WATCH OUR FILM, I WANT YOU TO REMEMBER ONE IMPORTANT THING . . . AS LITTLE AS EIGHT YEARS AGO THERE WERE NO HOMES, ROADS, NO GOLF COURSE, OR INDUSTRIES IN ANY OF THESE PROJECTS . . . JUST RAW RANCH LAND. TODAY YOU WILL SEE HOW HORIZON HAS INVESTED MILLIONS IN THESE PROJECTS, ENGINEERING A MASTER PLAN . . . ROADS, SCHOOLS, COUNTRY CLUBS, ETC.

THE EXCITING PART IS THAT YOU RIGHT HERE CAN INVEST IN LAND THERE.

TO ILLUSTRATE THIS POINT . . . AT PRESENT THERE ARE MORE THAN 100 THOUSAND FAMILIES JUST LIKE YOURSELVES THROUGHOUT THE UNITED STATES, WHO OWN PROPERTY WITH HORIZON IN OUR SOUTHWEST COMMUNITIES. I MIGHT ADD THAT APPROXIMATELY 2200 OF THESE FAMILIES LIVE RIGHT HERE IN THE DENVER AREA.

SO . . . TONIGHT LADIES AND GENTLEMEN . . . WE WILL TALK TO YOU ABOUT YOUR OPPORTUNITY TO MAKE IMPORTANT MONEY AS A MODEST INVESTOR.

LADIES AND GENTLEMEN WE ARE VERY PLEASED THAT ONE OF OUR INVESTORS THAT YOU KNOW FROM STAGE, RADIO AND TELEVISION HAS CONSENTED TO NARRATE OUR FILM AND IS ALSO A LARGE LAND OWNER OF HORIZON PROPERTIES . . . MERV GRIFFIN.

NOW . . . IF YOU WILL JOIN ME WE WILL SEE HOW FAMILIES ARE MAKING MONEY WITH HORIZON CORPORATION. (CX 857B–C)

After showing the Merv Griffin or Leif Erickson film, a sales presentation is made by a master of ceremonies. A transcript of a speech given at a dinner party in Denver carried the basic theme that land is the best investment that can be made, better than savings in banks, insurance or stocks. Examples of fantastic profits that have been made on real estate in the Denver area were pointed out to the dinner guests. Thereafter, the speaker described the Horizon plan for making money:

. . .Basically this, it's a plan that has been extremely successful for Horizon Corporation and for the families that have invested with us. It's [known] as this, it's a

three-step formula. Location plus population and I think you'll have [to] agree with me, number three is location plus population equals money in land investment today. . . . We don't go out and we don't just select any land and say we're going to build a [40]city here. No sir. We do not do that. We go to the growth communities of the Southwest (CX 601, p. 8).

The speaker then described Horizon's selection of land in the Southwest in locked-in growth corridors where growth can go in one direction only. The sales presentation was directed to Rio Communities near Albuquerque. Albuquerque was described as a growing city with a fence around it with only one gate through which industry and population can move towards Horizon's Rio Communities. The speaker described the Paradise Hills project where land was purchased from Horizon in 1962 for $99 to $199 and is now valued at $3500 to $5000:

Now this evening, ladies and gentlemen, we're going to talk to you about a savings investment program an opportunity like was offered in Paradise Hills in 1962 where families did make money. . . . This is an opportunity to take part with a multi-million dollar corporation and you too joining many thousands of families and making money (CX 601, p. 14).

The dinner party invitees were advised that an IBM 360 computer in Tucson, Arizona allocates to the 63 sales offices across the nation the investment properties which are available. Each sales representative has "an envelope with this evening's allocation":

Due to the mere fact that Rio Del Oro is just about invested . . . our allocations are limited for this evening. Therefore, representatives, in the event that the two families are interested in regards to the same option of property which is available it will be on a first come first served basis (CX 601, pp. 16–17).

CX 858A–I is a copy of another Denver dinner party sales presentation that was used on numerous occasions. This presentation represents that across this country "there is a twenty per cent return on real estate investments" (CX 858C). Examples of tremendous profits on Denver real estate are mentioned. Horizon's corporate worth is stated along with the fact Horizon selects land in the growth communities of the Southwest where there is locked-in growth corridors and then master-plans the communities. "Money was made and is being made today in our land investments" (CX 858F). The dinner party presentation mentioned El Paso, Texas with a locked-in growth corridor and the Horizon City project. The speaker stated that land in Horizon City sold for $200 to $800 in 1964 and at the time of the dinner party speech was selling for $3500 - $5000. It was represented that this same profit potential would be available to prospects purchasing at the dinner party (CX 858G, H).

It was further represented that $1,000 invested with Horizon in 1962 would be worth $16,525 in 1970 "and this is fact it is not conjecture" (CX 858I): [41]

Ladies and gentlemen isn't this the type of investment that you would like to have for your family. Now we have every reason to believe that the same type of profit opportunities are available to you and your family . . . and we believe there is an even greater opportunity for you and your family today with Horizon Corp. with its tremendous assets and technical knowledge we now have.

* * * * * * *

Now ladies and gentlemen if you have a desire to make things happen for your families listen to your representative he'll make you money with Horizon Corp. (CX 858I)

The instructions to the sales representatives at the conclusion of the dinner talk was as follows:

PARTY CLOSE

Immediately upon completion of principal presentation, take envelope and open it. Look at allocation sheet and select option, WITHOUT DISCUSSION which you feel best suited. When speaker asks your option—Mr. Speaker, I want the primary on option no. _____ .

Now Mr. and Mrs. Jones what I've selected for you is an investment program of only $23.00 per month—let me show you what secures your investment—(Take out T.B.A. Map) (At this time go into "Path of Development" story showing locked in growth pattern & tracing route out of city—highlighting developments and industry on the way to the project, then through the project highlighting development of the area and mentioning appraisal value of lots in developed areas, then to particular areas where their investment is located.)— Note: 5 Basic Qualities of that Presentation.

Mr. & Mrs. Jones, your investment is secured by two residential homesites here in unit 30—as I mentioned earlier, a lot in the developed area right now is selling from 3.5 to 5 thousand dollars, and Horizon Corporation has every reason to believe that the parcels I've selected for you will be worth at least that in full development. In other words, we are discussing a return of 7 to 10 thousand dollars over the next 8 to 12 years! Does that sound [42]like a pretty good investment to you, (NAME) (GET COMMITMENT, NO NODS OR GRUNTS-VERBAL COMMITMENT) (CX 859A).

(6) *New Horizons Magazine*

48. Horizon publishes a magazine quarterly, *New Horizons,* that is distributed to Horizon's customers and used in sales offices as sales brochures. These magazines or brochures portray the Southwest as growing and Horizon as rapidly developing its properties. These publications continue the basic theme that Horizon's properties are an excellent investment (CX 505–15). Other brochures distributed by

Horizon reinforce the basic representation that the Southwest is growing and this will impact favorably on Horizon (CX 516–24, 706; Tr. 934–35, 3530). One customer testified about receiving *New Horizons*:

Q. Mr. Carter, did you also receive in that packet of materials any other items?

A. Well, yes. It is a paper printed by Horizon [CX 504] and it made my investment look real good (Tr. 917).

B. Land as an Investment

49. Land is represented by Horizon's sales representatives to be the best investment that can be made by the modest investor. Land is represented to be the best hedge against the persistent inflation which exists. Land as an investment is specifically represented as being superior to savings accounts, insurance and stocks and bonds. Bill Cook, the Vice President for Sales of Horizon, when he was a sales manager and a sales trainer, represented to trainees—"He made it quite evident that the land was the thing to buy and not the other investments" (Tr. 1928). One regional manager testified he trained sales representatives: "Well, of course, we told them land was the basis of all the wealth in the United States, that it was the best investment that you could make" (Tr. 4509). A district office sales bulletin, included as part of a training manual, instructed trainees to sell "*LAND* as an Investment, proven to be superior to all others" (CX 778Z–10).

Sales representatives testified they used comparisons of land with savings accounts, insurance and stocks, and represented land as the best investment (Tr. 2308–10, 3719, 3721, 4567, 1643). One sales representative testified:

Q. Did you ever in any of the sales presentations you made while you were at Horizon compare land to other investments?

A. Yes.

Q. How did you do that? [43]

A. Just listed off four major types of investments, stocks and bonds, savings accounts, insurance accounts and the growth in land nationally, and the land was far superior to any of the others (Tr. 4567).

Another sales representative testified:

Well, we compared the different investments. We compared stocks and bonds, savings accounts, life insurance and annuities, and land and different ways that people could

invest their money and what was the greatest growth potential, which was land. The whole presentation was geared around that (Tr. 16431).

Customers testified about the representations that were made to them:

Basically, the program that he presented, or the investment he presented to me was that this was indeed a good investment of your money compared to other investments in a Savings and Loan, in the Stock Market, things of this nature. The fact that land does not lose its value, that it will only appreciate. There's not going to be any more of it (Tr. 819; see also Tr. 1239, 1159–60, 1472, 6544).

* * * * * * *

Well, one of his favorite phrases was, "They are not making any more land," and now is the time to get in on the profit making (Tr. 893).

* * * * * * *

Well, he said the way land, the cost of land was rising that there was no better investment than land itself. That it was better than bonds or stocks (Tr. 910).

Testimony of other customers about land as an investment, and land being superior to other forms of investment are at Tr. 910, 1189–90, 1238–39, 1159, 1325, 1613–14, 1563, 1688, 1824, 5921, 6257–58, 6326, 6337, 6451, 6472–73, 6544, 16153, 16208.

C. Use of Examples of Appreciation In Land Values

50. Sales representatives were trained to use well-known examples of substantial profits that have been made on land in the [44] past. A training manual used in the Southwestern Zone instructed sales representatives that a well-chosen story about local people who made fortunes in buying cheap land and reselling it ". . . can be a powerful incentive to buy for a prospect. But be careful—these stories infer" (CX 180Z–11). The training manuals include examples of land value increases in Horizon property, in cities bordering Horizon property, and in the locality of the sale for use by sales representatives (CX 160S, 180Z20, 615 O,Y, 856C, 956P, 957, 961D).

A training manual used subsequent to January 1971 gives as an example Horizon's Paradise Hills land that sold for $600 an acre in 1962 and in 1966 was selling for $2500 an acre (CX 6150, 615O Z24). A training manual used in the Philadelphia office cites an example of four acres of land in that city that increased in value from $12,000 an acre to $200,000 an acre in only eight years, and another example where land increased from "practically nothing" to $24,000 per acre in 13 years (CX 956P). Other examples in training manuals, films and presentation manuals include a 10-year increase from $100,000

to $600,000 of a half-acre lot in the business district in Washington, D.C.; a 20-year increase from $150 to $5000–$6000 per acre for subdivision land in Springfield, Illinois, and a sharp rise from $250 to $5,000 for building lots in Squaw Valley, California (CX 527D,L, 195Z, 615Y).

Presentation manuals, films and training manuals also pointed out increases in the value of land located near the areas of Horizon's properties. The Merv Griffin film and the Gold Presentation Manual note that land in Albuquerque which sold for $100 an acre in 1947 was selling for $15,000 only 22 years later (CX 615Y, 195Z, 527E). Other examples, such as a 20-year rise in a lot from $75 to $50,000 and a 6-year jump from $1,000 to $4,000 per acre, are mentioned (CX 195Z, 615Y). The Gold Presentation Manual and training manuals used with it point to a 10-year rise in 10 acres of apartment land in El Paso from $35,000 to $250,000 (CX 195Z; see also 615Y). Horizon City TBA maps used in sales presentations also refer to that specific price increase and cite other examples of land valued at amounts as high as $125,000 per acre (CX 220A, 221A).

In a "Similar Situation or Story Close," which sales representatives were trained to use, the sales representatives sought to capitalize on a prospect's indecision by pointing out how costly such indecision had been for someone else. The sales representatives did this by discussing another prospect who could not make up his mind whether to buy a parcel for $695 with only $10 down and $10 per month, which in just 3 years "had appreciated to $2795." In describing a recent meeting with the earlier prospect who did not buy, the sales representative points out "the really sad part of the story" to his current prospect: "By not making a decision that night [three years ago, that prospect] did not have $2100.00 profit the land would have brought him" (CX 961D–E).

Sales representatives testified that they used examples in their sales presentations of property that had increased in value (Tr. 1866–67, 2125, 2184, 2163, 2341–42, 3740, 4356–59, 4390, 4525, 4549, 4643, 4668, 4689, 16131–32, 16499). Horizon's internal surveys of its sales offices revealed instances where price increases of **[45]**other properties were used in sales presentations (CX 930F, 941C). One sales representative used as an example Northglenn, Colorado, where land purchased for $35 per acre in 1959 was worth in excess of $36,000 per acre in the 1970's (Tr. 4549). Customers confirmed that these land value examples were used (Tr. 6484, 4936). One customer was told of a purchaser who paid $9–10,000 for Horizon property and sold it three years later for $90,000, over ten times what had been paid for the property (Tr. 6484).

The dinner party speakers referred to examples of land values which had increased substantially in the past (CX 858D, 601, p. 7, 12, 15–16). One example in a dinner party speech referred to land in Denver that went from $800 an acre to $90,000 an acre in a few years (CX 601, p. 13). Paradise Hills lots were described as appreciating to $3500 to $5000 from $99 to $199 a few years earlier (CX 601, p. 12).

Sales representatives also used recent price increases by Horizon on its lots to show how land was increasing in value (Tr. 1865–67, 2002, 3526–27, 3771–72, 4657). One sales representative told prospects that people had previously bought land from Horizon for $199 and that the land was "worth" at the time of his presentation various amounts from $1500 to as much as $3000: "It was always—it was up to the discretion of the representative at that time. He used his own figures. There were no figures" (Tr. 5970). Sales representatives also were trained to tell prospects that Paradise Hills land, which supposedly cost $80 for a "home site" when Horizon started, was selling at the time of the sales presentation in 1970 and 1971 for over $5,000 and up to $10,000 to $14,000 along the golf course. Sales representatives stated that those "original investors" had "reaped the profits" because they "had the faith in Horizon to invest right on the spot" (CX 856C; Tr. 4541–43; see also Tr. 4474–80, 16421–26, 16455–56; CX 957B).

The use of the examples of tremendous increases in land value was to raise the inference that this could logically happen to the Horizon land now being offered for sale (Tr. 16500, 4643).

D. Use of Federal Housing Administration Statistics

51. Training manuals and presentation manuals used FHA charts to depict the increase in value of residential lots over the last three decades (CX 194 O, 195T, U,V, 196Z21, 197Z23, 160, 161Z17, 163V, 615Z12–Z14, 856A–F, 956M, 957F, 856D, 962A–H). One training manual refers to the FHA charts as "the most powerful selling tool ever devised" (CX 962A). A training manual used during the period 1970–1972 trained sales representatives to point out the FHA charts and the price increase of 552% on improved lots from 1946 to 1968 and the 800 percent increase on the land without improvements, or 20 percent per annum compounded which the charts depict.

Horizon's internal survey of its sales offices revealed instances of sales representatives utilizing the 20% price increase as representative of the price appreciation Horizon's property would realize (CX 928B, 941C, 942A–C, 160Q). A training manual used in the North-

west Zone suggests that sales representatives answer any **[46]** question about the resale value of Horizon land by referring to the FHA charts in the presentation manual (CX 159X).

Sales representatives testified that they used the FHA charts in sales presentations (Tr. 1861–62, 2309, 3510, 3719, 3721, 3766–67, 4355, 4553–55, 4595, 4629, 4632–33, 4646–48, 4657–60, 16465, 16500). One sales representative testified that ". . . the twenty percent FHA averages were something that I used all the time" (Tr. 4657). "FHA, Federal Housing Administration was strong. If the government says it's good, it's good" (Tr. 16465). Customers also testified to the use of the FHA charts by the sales representatives (Tr. 1828, 4895, 4909–10, 6255–56, 6493).

The use of the FHA charts, which show substantial increases in building lot values since 1946, was in the context that the increase could logically happen to Horizon's land being offered for sale (Tr. 1862, 1865–67, 4648, 4595, 16500). Complaint counsel's expert witness, Dr. Howard Stevenson, stated that the use of FHA statistics lacked general relevance to Horizon's properties. Horizon's use of the FHA statistics compares all Horizon land to a center city building lot, which is not appropriate. Secondly, a strict projection of 20 percent compounded annually over a twenty-five year period would make an Albuquerque building lot be valued at $906,000 (Tr. 6783–84).

E. Representations of Lack of Risks in Purchasing Land

52. Since Horizon's entire sales presentations were geared to showing land, especially Horizon land, as the superior investment, it is not surprising that sales presentations represented Horizon land to be risk free, or were devoid of any mention of risks (Tr. 2061; CX 157–161, 163, 178, 615, 778, 856, 956, 957, 959, 194–197). In fact, the training manuals instructed sales representatives to impart the message that land can only increase in value, that there are no risks in buying land (Tr. 2071–72, 4525, 6350). "No risks in land. All the risks were in the other investments" (Tr. 1928). "The least amount of risk in any investment" (Tr. 16326). Sales representatives were instructed to seek referrals from customers for this "relatively risk-proof opportunity" a "risk-free investment" which Horizon offered (CX 778Z17–Z18).

Sales representatives testified that during sales presentations they did not mention possible risks in purchasing land (Tr. 4525, 6167, 16451). Theodore Stone, an Horizon employee from 1968 until 1974, who was employed as a salesman, district manager, regional

manager, and for four years as a zone manager (Tr. 1898–1904), gave the following testimony on cross-examination:

Q. What about this question of risk? Isn't it true that there was some discussion at one or more of these levels of authority concerning the existence and non-existence of risk as part of the investment. Isn't that true? [47]

A. Never heard of it.

* * * * * * *

A. I can never recall any instance anyone within the company above my position ever attacking our land, being critical of it, or suggesting that it was not a good investment, or that there were risk factors involved, or that it might go down in value, or that it was speculative, in fact, quite the opposite (Tr. 2072).

Sales representatives testified they were not trained to affirmatively point out sales risks to prospective customers (Tr. 16496). Customers testified that there was no mention of risks being involved in purchasing Horizon land:

Q. Did he mention anything with regard to the risk of buying land?

A. No, he said there was no risk involved at all; that the land would only grow in value (Tr. 910).

* * * * * * *

Q. What, if anything, did the saleman say about the possibility that the land could fall in value?

A. No possibility, that land has no way to go but up. It's not like the stock market and it's not like an automobile. Land don't depreciate (Tr. 1618).

Other customer testimony concerning the lack of mention of risks during sales presentations can be found at Tr. 16152–53, 16208–09, 1745–46, 5038–39, 1185, 4899, 4911, 4937, 5927, 6268, 6286, 6455.

The specific representations about lack of risks in the purchase of Horizon's land, made in the context of the general sales presentation about Horizon's corporate stability, the growing Southwest, Horizon's property located in the path of growing cities, the pre-planned communities, the development activity generated by Horizon, and the constant reference to land value appreciation and price increases on Horizon's own property, greatly exaggerated the safety and grossly understated the risk of buying Horizon land.

F. Representations of Profit Potential

53. The record contains substantial evidence that representations were made to customers concerning the length of time before a

purchaser could expect to realize a profit on the land investment, the percentage of profit which would be realized within [48]that time frame, and the ease with which resale could be accomplished. These representations were both general and specific. The general representations included the growth of the United States population, the growth of the Southwest, the growth of Arizona, the shortage of private land in Arizona, the locked-in growth of Albuquerque and El Paso, the excellent location of Horizon's properties directly in the growth pattern of these cities, Horizon's investment in the planning and development of the properties, and the past record of growth of Horizon's properties. Population growth and the other attributes of Horizon's properties would assure its rapid development and profitability. The percentage of profit to be expected was referred to generally by reference to the FHA charts, to examples of property price increases in the locality of the sales presentation and in other areas of the country, to references of land as the best hedge against inflation, and to the price increases on Horizon's property and profits that had been made on Horizon properties in the past.

In addition to these general representations as to profitability, specific representations were made by sales representatives as to the time the property would be developed or could be sold at a profit, and the expected percentage of profit. Bruce Lehmann, who participated in most of Horizon's internal surveys of its sales offices during 1973, 1974 and 1975, (see Findings 89–97) wrote on September 4, 1975, about the sales representations being made by Horizon's sales representatives:

> The future development of Horizon's properties is not presented to the customer in speculative terms stressing its dependence upon many complex and variable factors. But rather, it is dealt with as a predictable assured trend whose pattern and design is known by the representative (CX 929E).

An analysis of the training manuals, presentation manuals, dinner party speeches, other documents of record, and testimony of sales representatives and customers reveal beyond any doubt that representations were made concerning the profit potential of Horizon's property and the time frame within which such potential would be realized.

(1). *Training Manuals*

54. Training manuals in use in the period 1968–1971 reveal generally that although there were detailed instructions in ways to promote sales, there were no instructions or directions to sales representatives concerning any restrictions, limitations or prohibi-

tions regarding representations that could be made respecting the percentage or amount of appreciation to be expected, the time frame within which a profit could be realized, or difficulties in reselling the property after purchase.

In this regard, the following manuals and presentations serve as examples: CX 778, a General Reference Guide for Sales [49]Representatives dated March 1, 1970, has no instructions, limitations or prohibitions concerning representations of time, value or resale difficulties. Yet, the Guide does concern itself with other possible questions or objections which may be raised by prospective purchasers.

CX 856A–F, a standard sales presentation used in the Northglenn (Denver), Colorado office during 1970–71 (Tr. 4541–42), makes no mention of instructions, limitations or prohibitions on representations concerning the percentage of profit to be expected, the time frame for profitability or difficulties of resale. This presentation does provide training on the use of the FHA charts in the presentation manual to show a 552% increase in the value of a developed lot in 22 years.

CX 956, a training manual used in the Philadelphia office during 1970–1971 gives several examples of substantial increases in land values: Philadelphia land increased from $12,000 an acre to $200,000 eight years later; land in a Philadelphia suburb went from "practically nothing" in 1957 to $25,000 an acre in 1970; a Washington, D.C. lot increased in value from $86,000 an acre in 1960 to $800,000 in 1970; Albuquerque land selling for $100 an acre in 1947 was selling for $15,000 an acre in 1970. The sales representatives were also trained to represent that a $2400 investment in Horizon land would be worth $15,000 in ten years. This training manual has no instructions, limitations or prohibitions on representations concerning percentage of profit to be realized, the time frame within which a profit could be realized or resale difficulties.

CX 957, a sales presentation used in the Ardmore, Pennsylvania Office in 1970 and thereafter (Tr. 16302, 16455), cited an example of Horizon's Paradise Hill lots which increased in value from $600 per lot in 1959 to $12,000 in 1970. This sales presentation is silent on instructions, limitations or prohibitions on representations concerning percentage of profit, time frame to profitability, or resale problems.

CX 959, a listing of suggested answers to possible questions by prospective purchasers, used in the Philadelphia office during 1970 (Tr. 16319), has no questions or answers on the time of development

of the property offered for sale, the possible resale value of the property, or any resale difficulties that might be encountered.

CX 615, a training manual used in 1971 and thereafter, contains, as does CX 956, several examples of land that has increased substantially in value, and FHA statistics which show increases that amounted to 20% compounded annually. This training manual also instructed sales representatives to represent that the Horizon property being offered for sale at $900 per lot would be worth $3,500–$5,000 "at the time of development" (CX 615Z27). The training manual is silent as to instructions, limitations or prohibitions concerning percentage of profit, a time frame for profitability, and resale difficulties. **[50]**

CX 160, a training manual used from the Spring of 1970 to at least the Fall of 1972 used the FHA property increases—approximately 20% compounded annually, but is silent on instructions, limitations or prohibitions on percentage of profit, time frame to profitability, and resale problems.

CX 962, used until 1972, is a sales presentation based on the use of the FHA statistics ". . . the most powerful selling tool ever devised." (CX 962A). The sales representatives were instructed to explain the FHA land appreciation data and then let the prospect select what *he* considered a conservative growth rate. This document also pointed out that land sells many times before development and that it can be held for long periods to realize all the growth or sold along the way at an appreciated value. It is further stated that resale of the land will be no problem—the real estate investment market is enormous. This presentation is silent as to any instructions, limitations or prohibitions on representations concerning profitability, time frame to profitability, and resale problems.

CX 180, a training manual used in the Southeastern Zone subsequent to June 1971 and in 1972 (CX 180K; Tr. 8764), states that Horizon property must be sold as a long-term investment, and that no estimates of when a buyer will make a profit should be made. However, ". . . if we are absolutely unable to avoid it, it must be 12 to 15 to 20 years or more'" (CX 180S). Sales representatives were instructed not to guarantee a profit, but to present the facts of the past and anyone can draw a logical conclusion from these facts. It is also pointed out that Horizon does not offer to resell a customer's property or buy it back. Since Horizon does not have a "crystal ball," it cannot foretell the performance of a specific piece of property (CX 180S).

CX 180, however, has instructions to the sales representative demonstrating how the prospect can be shown that two single family

lots selling for $900 each can be controlled for 10 percent down, and sold for $6,400 at development (CX 180Z–13). This is termed "The Automatic Close" and for best results was to be memorized word for word. CX 180 also instructed the sales representatives to point out that Horizon's Paradise Hills project had lots selling for $600 an acre in 1962 which were worth (1971–72) $3,000 an acre and more. Further, sales representatives were instructed to project that Rio del Oro lots selling for $900 would be worth the same as the developed lots in Enchanted Mesa, [Horizon's developed core area in Rio Communities]—$3,500 to $5,000 "at the time of development" (CX180Z–20).

CX 161, a training manual used Spring 1971 to February 1972, has a list of "don'ts": "Don't project or refer to profits or timetables" (CX 161Z5); "Don't forget you are selling a long term investment, and long term means ten years or longer" (CX 161Z5); and "Don't forget that Horizon does not guarantee or predict when or how much money a purchaser will experience—nor does Horizon allow a sales representative to make such predictions" (CX 161Z5). This training manual also posed a series of possible questions with corresponding answers. One answer stated that Horizon cannot **[51]**guarantee a particular profit on a particular timetable; however, an evaluation of history and facts from the best available sources "can lead to logical and profitable conclusions" (CX 161Z15). It is also stated that property can be resold within ten or fifteen years (CX 161Z16). FHA statistics are used to answer any question concerning possible resale price of the property (CX 161Z17).

CX 163, a training manual used in Horizon's Northwest Zone, has special training on selected questions: "When Can I Sell This Land For A Profit" and "What Will I Be Able To Sell These Lots For" is answered by ". . . that is a very difficult question to answer, specifically" (CX 163V). FHA statistics are used to show how land values have gone up in the past. This training manual also has the following statement: "No one can precisely forecast property values in the future. In fact, Horizon prohibits its people from doing so" (CX 163G). This language follows closely the statements in the "Principles of Land Ownership" (RX 67), issued sometime after May 1, 1973 (see Finding 57), which indicates CX 163 probably antedates that document.

CX 905B,D, a training tape apparently dated September 1, 1973, stated that land lacks liquidity, no one can precisely forecast property values in the future, and Horizon prohibits its people from doing so. The training tape also pointed out that anyone desiring certainty may lose an opportunity to profit.

CX 157, a training manual used in 1974, contains language apparently adopted from the "Principles of Land Ownership," as follows:

No one can precisely forecast property values in the future. In fact, Horizon prohibits its people from doing so. Those individuals not sufficiently informed who insist on guarantees of specific value increases, development time, resale, repurchase or profitability, should not buy our land, or in fact, any land. You see, the world is filled with people who want everything guaranteed, who will not act in the face of uncertainty. Unfortunately, by the time they are certain, everyone else is too and the opportunities are often gone (CX G–H).

CX 157 lists some specific "don'ts":

Don't project or refer to profits or time tables (CX 157T).

Don't forget that Horizon does not guarantee or predict when or how much money a purchaser will experience—nor does Horizon allow a sales representative to make such predictions (CX 157T). **[52]**

Additionally, CX 157 has questions and answers about when the land can be sold for a profit and when the lots will be developed. Answers include statements such as "that is a very difficult question," and lots will be developed "when the population warrants it" (CX 157U,W). The FHA statistics are also used to answer these questions.

CX 158, used in 1973, and CX 159 are training manuals that raise questions and answers. The answers state that Horizon does not "guarantee" a profit and cannot predict when to sell lots, that these are difficult questions but that land values should continue to rise and the longer the lots are held the greater the increase in value will be.

(2) *Dinner Party Speeches*

55. Dinner party speeches in the record do not have any instructions, limitations or prohibitions concerning percentage of profits, the time within which the property will be developed or can be resold at a profit, or any problems that may be encountered in resale. In fact, CX 858, a copy of a dinner party speech used in Denver, gives examples of profits made on land:

(1) Northglenn, Colorado land selling at $2–3–4–800 per acre a few years ago currently worth $90,000 an acre;

(2) Cherry Hill Shopping Center which was merely a dump a few years ago;

(3) Horizon City lots selling for $2–800 in 1964 currently worth $3,500–5,000; and

(4) an investment in Horizon of $1,000 in 1962 worth $16,525 in 1970.[2]

CX 601, a transcript of an actual dinner party presentation, made no mention of limitations concerning percentage of profits, the time frame to development or profitability, or difficulties of resale. This dinner party presentation lists examples of land value increases similar to those listed in CX 858.

(3) *Presentation Manuals*

56. The earlier presentation manuals, CX 194, 195 and 196, did not have any statements concerning limitations or prohibitions on percentage of profit, time to profitability, or resale problems. However, beginning in early 1974 (CX 307; Tr. 1986) the presentation manual had substitute pages added which carried the following **[53]**statements (in type much smaller than other representations on the pages):

The figures used in this chart are the latest available Federal Housing Administration figures showing by year the average selling price of improved sites on which new FHA-insured single family houses were built. Source for this information: Division of Research and Statistics. Market price of sites for new one-family homes, Sec. 203.

Naturally all land does not increase in value at a particular rate. The value of land is based on what a user will pay for it. Land which has no immediate use has a value which can only be estimated by judging when a user market will exist. Many complex factors affect the time which it will take vacant land to be ready for development and the user market. The general, regional and local economies, the area's rate of growth, interest rates and availability of capital are all examples of these factors. (CX 197Z–23).

No one can precisely forecast property values in the future. Horizon prohibits its people from doing so. Those who insist on guarantees of specific value increases, development time, resale, re-purchase or profitability—should not buy our land—or any other land. The world is filled with people who cannot act in the face of uncertainty. Unfortunately, by the time they are certain, everyone else is too, and the opportunities that existed earlier are gone. (CX 197Z–24).

Land owned for the long-term not the short-term. Now, what do we mean by long-term and short-term? Horizon's use of short-term is less than ten years and long-term more than 20 years. This does not mean the land that we offer for sale today will not be used for 20 or more years—portions of it in or near present development areas may be used within the short-term and other portions over longer periods. The main consideration is not to commit funds needed for foreseeable necessities or which are being held in reserve for unknown contingencies. (CX 197Z24).

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[2] This representation of $1,000 *invested* in Horizon in 1962 and worth $16,525 in 1970 is not altogether clear. It could be interpreted to mean investment in land or investment in Horizon corporate stock. However, it most likely would be understood by dinner party guests to mean land, since land was the subject matter of the presentation.

The above statements reflect language contained in the "Principles of Land Ownership"(RX 67); which was first distributed in mid-1973 (Finding 57). **[54]**

(4) *Other Documents*

57. By memorandum dated May 1, 1973, Sidney Nelson, President, Horizon Corporation, stated to all employees certain principles of land ownership which related to the profit potential of Horizon land (RX 1551). In August 1973, these principles were printed in a brochure entitled "Principles of Land Ownership - A Policy Statement by Sidney Nelson, President, Horizon Corp." ("Principles") (RX 67), and distributed to sales representatives (Tr. 13563). Thereafter, Horizon included a copy of the "Principles" in the "important document package" which was sent to customers after the sales transaction had been completed at Horizon's Tucson headquarters (Tr. 12889–95, 13565). The eleven principles are as follows:

1. Every individual, with discretionary financial resources, should be encouraged to own land. No sounder investment exists, when entered into with informed awareness. Horizon believes its properties to be an ideal subject of purchase for all such people. Sound judgment must be employed, however, to insure that purchases are not made by those for whom land is an unsuitable purchase.

2. Since real estate generally, and vacant land particularly, lacks liquidity (convertibility into cash at a fair price at will), caution should be exercised to commit only funds which are comfortably available from "discretionary" income or from liquid assets which are not necessary to meet foreseeable necessities, to include a reasonable allowance for unknown contingencies. This axiom applies to any initial or subsequent purchase of land.

3. The notion that all land increases in value at some particular rate or another is fallacious. Placing other factors such as area growth aside, real estate may increase in value to offset inflation.

4. The value of land is based on what a user will pay for it, now or in the future. Land which has no immediate user market has a value which can only be estimated by judging when in the future a user market will exist, and what the value of such property will be then. The future value as determined should then be discounted to its present estimated value dependent on the time differential.

5. Many complex factors affect the time it will take a given piece of vacant land to be **[55]**"ready" for development and the user market. The general, regional and local economies; the area rate of growth; interest rates and availability of capital are all examples. Horizon selects land for its developments in areas which it believes are influenced by factors favorable to long-term growth. We cannot control nor precisely predict (nor can anyone else) when these factors will mature, but Horizon is convinced that dynamic growth is predictable in its developments in the long term.

6. What do we mean by "short-term" and "long-term"? A buyer of land must be conservative in his application of these terms. Horizon's use thereof shall read "short-term" as less than 10 years and "long-term" as more than 20 years. In between is the gray area which cannot be defined more closely.

7. This does not mean that the land we offer for sale today *will not* be used for 20

or more years in that portions in or near present development areas may be used with the near term and other portions may only be used over longer periods. Each individual should carefully consider and then buy only that land he can afford to put aside as a long-term asset.

8. The world is filled with people who will not act in the face of uncertainty; unfortunately, by the time they are certain, everyone else is too, and the opportunities existing earlier are often gone. While this is a truism which each prospective landowner should recognize, it should never be allowed to influence him to buy any land without careful consideration.

9. Horizon cannot make forecasts of property values in the long-term future, and prohibits its personnel from doing so. Those who do not wish to buy land based on the fundamental factors recited in this statement of policy, but insist on an assurance of specific value increases, time to development, guarantee of resale, repurchase or profitability, should be advised plainly that we do not recommend their purchase of our land or any other land.

10. Particular care should be exercised by older people, near or in retirement, to assure that no purchase is made upon which realization of an economic return is essential to the buyer to provide for his retirement needs. Personal or family use of the property, or estate purposes, is the only **[56]**reasonable basis for purchase by such persons in view of the long-term nature of the investment.

11. When presenting property to prospective owners, Horizon personnel shall clearly explain and be guided by the spirit and intent of this statement of policy.

Horizon's internal surveys of its sales offices during 1974 and 1975 revealed clearly that sales representatives did not use the "Principles" in their sales presentations. Further, it was found that the "Principles," which were sent to customers several days after the sales transaction had been completed, were not read by the customers (CX 938D, G, H, 951E, F, G; CX 945A).

(5) *Representations by Sales Representatives*

58. Training documents recognized the questions which are paramount to a potential customer. "Any investor may want to know three things. How much can he make? When can he make it? How does it come about?" (CX 962E). The training manuals and presentation manuals previously discussed indicate that sales representatives beginning sometime after 1971 were instructed how to answer questions by prospects concerning when and how much profit they could expect from purchasing Horizon land. The suggested answers to these questions were "that is a very difficult question to answer" (CX 163V, 157U, W), or "no one can precisely forecast property values in the future" (CX 163G). These answers are followed by explanations as to what property has done in the past. Testimony by sales representatives demonstrate how these instructions were effectuated.

One very experienced sales representative and sales trainer,

Barbara Kelly, who was employed in Horizon's Philadelphia office from September 1969 to September 1972, testified that she did not affirmatively tell prospective customers about the period for profitability or specific problems in reselling the land; it was only if they asked—"it was not part of the presentation" (Tr. 16494–95):

JUDGE BARNES: As part of your presentation, did you make an effort to tell people all of these things?

THE WITNESS: No.

JUDGE BARNES: If they asked questions, then you did?

THE WITNESS: Yes. (Tr. 16,496)

She testified that sales representatives used a structured approach, that price increases that other properties had experienced in the past were cited to the prospect to indicate what the property being sold could potentially be worth in the future—"using FHA figures and everything else" (Tr. 16,498–500). This presentation answered the questions for the prospects: "That's the way the presentation was geared and that's the way we understood it" (Tr. 16,498). **[57]**

Another sales representative, employed from August 1970 to December 1971 and who served as a sales manager for over one year, testified that he approached the subject of time period and profitability by using the FHA statistics, and by leading the prospect to answer his own questions:

We are leading to the point that that is a dramatic increase and off of this statement we then asked the client, "what do you think the value of land would be?"

Of course, we have pre-empted that with directional growth, and they would come and indicate, "Yes, yes, that looks like the value ought to go up dramatically!"

They drew the conclusion from what was shown (Tr. 1862–63; see also Tr. 1873–74).

* * * * * * *

Yes, we would attempt to get them to answer their own question by the appreciation of land value in Austin, Texas [where the sales representative was employed] and the appreciation of land value as shown in the [FHA] charts in the presentation book and just lead them to the conclusion (Tr. 1866–67).

* * * * * * *

As I explained, we went back to the presentation booklet and pointed out to them the growth pattern and "they" drew conclusions, sir (Tr. 1874; see also Tr. 1866).

Another sales representative testified that he too would let the customer speculate about the time period by using a city the prospect

was familiar with: "He would normally say five or ten years" (Tr. 2185; see also Tr. 2125, 2184). Other sales representatives also testified that they would rely upon the FHA statistics and then place the burden of future price or value back on the shoulders of the prospect and let the prospect answer his own question and do the speculating (Tr. 3510, 3553, 4792).

Another method used by sales representatives was to respond to customer inquiries by stating that no one has a "crystal ball", and then refer to examples of property value increases in the past (Tr. 4704, 4706–08, 4772–73, 4791–92, 16,494; see also Tr. 13,547, 10,241, 13,343, 11,384, and 16,137). Besides the "crystal ball" answer, and the shift of the burden to the prospective customer, the record clearly demonstrates that sales representatives made specific representations concerning profitability and the time period in which such profitability would be realized. **[58]**

Theodore Stone, employed by Horizon from 1968 to 1974 and who served as a zone manager from 1970 to 1974, testified that he was trained in 1968 by Bill Cook, who later became Horizon's Vice President of Sales, to tell prospective customers they would have to hold their land 6 to 8 years to realize a profit (Tr. 2030). He further testified that in late 1972, as a result of many, many meetings in Tucson among zone managers as to what investment claims should be made: "The decision was to identify it as long-term, long term meaning ten years or longer" (Tr. 2032). Thereafter, in 1973 "there was a great deal of confusion in my last eight or nine or ten months with Horizon as to what investment claims could be made and what couldn't be made. The Principles of Land Ownership came out about that time and there were statements in the Principles about time periods that confused the issue even further.

"The Gray Area was made use of and the salesman, everything he had all of a sudden was in the Gray Area" (Tr. 2034–35).

* * * * * * *

Well, item 6 [of the "Principles"] says What do we mean by "short-term" and "long-term"? "A buyer of land must be conservative in his application of these terms. Horizon's use thereof shall read short-term as less than ten years, and long-term as more than twenty years. In between is the Gray Area which cannot be defined more closely."

That added a great deal of confusion in the salesman's mind in that there was some properties still that were short-term, some that were long-term, and some were in the Gray Area.

There was a lot of abuse given the short-term and the Gray Area that we as developers who knew where those areas were (Tr. 2037–38).

Mr. Stone considered a misrepresentation about the investment potential time period as a most severe misrepresentation of the property and he terminated sales representatives for such misrepresentations (Tr. 2065). He testified that whatever time period was agreed upon at the meetings in Tucson he passed on to the salesmen— . . . "The consensus was ten years or longer" (Tr. 2066):

JUDGE BARNES: Mr. Stone, can you sell that property if you told people it would be ten years or more before they realized any appreciation?

THE WITNESS: Yes, sir. **[59]**

JUDGE BARNES: You could?

THE WITNESS: Yes, sir. The argument was with the twenty years. That was the argument, whether you could say twenty years or longer, and there was not a zone manager within the company who felt like that he could go back to the field and put into the presentations and manuals to enforce the 20-year period, that no one would buy, and I agree with that (Tr. 2067).

* * * * * * *

Then, along about 1972 there was a real serious effort in meetings to see if we could not sell our properties with twenty years or longer, and that met with such resistance by all people who were supervising sales efforts that it was never adopted.

Then, in 1973 this Principles of Land Ownership came out and added a little bit more confusion as to that particular investment claim. When I left, they were still debating it, and I assume they still are (Tr. 2069–70).

Daniel B. Nickeson, employed by Horizon from August 1968 to November 1972 as a sales representative, sales manager, district manager and regional manager (Tr. 4497, 4518), testified that when he first started with Horizon ". . . we would use three to five years, they could expect some appreciation on it" (Tr. 4507; see also Tr. 4513).

Q. Did you tell them how much it would appreciate in that three to five year period?

A. We used different charts that showed what land values had done over the years and that we use 20 percent a year, 15 percent a year, 25 percent a year, and in some cases, you could point out to them what it has done in Denver here, some land has gone up 30 percent a year (Tr. 4507–08).

* * * * * * *

JUDGE BARNES: Did you say initially during that period of time that this was changed? **[60]**

THE WITNESS: Yes, it was changed two or three different times as far as the

number of years before we really felt that there would be a resale market for that property locally through a realtor. It was changed to where the company didn't want to even project any time or give them a time. At the same time they took the word investment out of it. We used to use it, and the Federal Government said you couldn't really say this was really an investment. So, they were very particular about not using that.

JUDGE BARNES: What time was it when this last change occurred?

THE WITNESS: This basically all came about in 1970, '71, this is when it started changing (Tr. 4513).

According to Mr. Nickeson, the word "appreciation" was used to replace the word "investment" (Tr. 4514). One sales representative, who also served as a sales manager and trainer, used words like "rainy-day fund type of thing or down the road or retirement fund" in lieu of using the word "investment" (Tr. 4666). Another sales representative testified:

We were later on instructed absolutely not to use it for investment anymore, and we were debating how we go around the investment. That is a fact (Tr. 16144; see also Tr. 16143, 5983, 6007).

Marc Knasel, an Horizon employee from September 1969 to November 1976, served as a sales representative, sales manager, district manager, a staff member of the Gulf Coast Zone, and from July 1971 until July 1974, the Director of Training at Horizon's headquarters (Tr. 3751–56). Mr. Knasel, at the time he served as a sales representative and district manager until July 1971, would respond to a prospect's question concerning when the prospect could resell his property, as follows:

I believe I used terms at that time in the nature of three to five years. If I was asked that question I would probably answer to the prospect three to five years, six years (Tr. 3769; see also Tr. 3929, 3934).

As for percentage profits to be made, Mr. Knasel testified: **[61]**

I recall in some of the earlier, in 1969, it sticks in my mind that there were some multiples mentioned, three to five times the investment (Tr. 3933).

Mr. Knasel testified that when he was first in the Tucson headquarters, subsequent to July 1971 he recalled that in management training sessions Richard Lovinger, Horizon's Vice President of Customer Service, spoke in terms of 10 to 15 years in addressing the field management people. This continued through June 1972. The first written instructions concerning time periods which Mr. Knasel

recalled, was Sidney Nelson's "Principles" distributed in the Summer of 1973 (Tr. 3946–3950).

One sales representative, employed from June 1971 to June 1972, was trained that property would develop in two or three years (Tr. 4385, 4389, 4425–26, 4435–37, 4443, 4446–47), and would appreciate at a rate of 25–30 percent per year (Tr. 4387, 4392). He also testified that sales repesentatives were given some property to sell especially to doctors (Tr. 4437, 4448), and some "hot" property that would develop within six months (Tr. 4416).

A sales representative and trainer, employed by Horizon in Las Vegas from July 1973 to August 1974, would answer prospects' questions about when the prospect could expect to sell the property by referring the prospect to the FHA statistics (Tr. 4632–33, 4646–48). This sales representative was not permitted to "come out and say" that a prospect could make a specific amount of money within a specific time period (Tr. 4646). "We wouldn't come right out and say your property is going to be developed, guaranteed to be developed. We didn't specifically come out and say that, but we kind of tended to lean toward that impression that it would be" (Tr. 4641). On cross-examination he further testified:

Q. When you gave examples of values of commercial and multi-family land in Las Vegas, you did not tell them that this would necessarily hold true in Rio Communities or in Horizon City, did you?

* * * * * * *

A. We wouldn't come out and specifically say your property is going to do that, but we tended to give them the impression that if they held on to their property and time warranted and it was developed, if they had commercial property and multi-family property, this would be what they would stand to get versus having single-family lots (Tr. 4643).

A dinner party sales representative employed in the Denver office from July 1970 until July 1971, testified that he was trained that single family property would grow anywhere from three to five **[62]** times, multi-family would grow from five to seven times, and commercial would grow up to ten times the original investment (Tr. 4771–72). This sales representative also used three different methods to show the time period involved; two, three, four, and five years; eight to twelve years; and the "crystal ball" method (Tr. 4772). The "crystal ball" method was used most often (Tr. 4773).

A sales representative who was a party salesman in the Chicago office from 1968 until 1975, testified that:

We generally use a figure that if the individual bought $2,700 worth of property and

from five to seven years that property should be worth somewhere between $9 to $12,000 (Tr. 5970; see also Tr. 6003–04, 6008–10, 6023, 6026–27).

This sales representative testified that he used this type of a presentation "all the time" (Tr. 5972), and that he used the rate of development as being "one square mile per year" "anytime I needed it" (Tr. 5972).

Another sales representative and sales manager, employed in Horizon's Chicago office from December 1970 to April 1972 (Tr. 6137–38, 6157), testified to representing that Horizon would establish satellite or pilot communities in the Rio Communities property, that the property would develop in four to seven years, and lots costing $1,400 would be worth $4,000 to $7,000 at that time (Tr. 6144, 6146, 6152–53). Horizon City property was represented to increase in value from $900, $1100 and $1400 to $4500 to $7000 in four to seven years (Tr. 6144). While this sales representative testified that the existence of pilot communities within a given time period was not a sure thing (Tr. 6166), any doubts or uncertainty was a very, very minor part of the sales presentation and very much downplayed (Tr. 6167–68).

A sales representative and sales manager, employed in Horizon's New York City and Brooklyn offices from February 1970 until July 1975, testified that she was trained that the development period for Horizon's property was seven to ten years "without guarantee" (Tr. 16110, 16142). After visiting Rio Communities in 1974, this sales representative stopped using seven to ten years because "I would be a liar" (Tr. 16111, 16136). This sales representative heard much talk about satellite areas which "infiltrated in the salesman['s] head and you infiltrated it into your client's head," but nothing was ever done about starting satellite areas (Tr. 16113).

Barbara Kelly, a sales representative and sales manager in Horizon's Philadelphia office from September 1969 to September 1972 (Tr. 16420–22), testified that when she started with the company ". . . they were telling us you are selling an eight to ten year investment" (Tr. 16432, 16491). Residential was the quickest-type investment, but you did not make as much money. Multi-family property was worth five times as much as single family property but it took a little longer, and commercial property was worth ten times what a single family lot was worth (Tr. 16432). This sales **[63]** representative was trained that Horizon would open up additional core areas to facilitate development, and she sold property based on the satellite core area concept (Tr. 16442–44).

Another sales representative employed in Horizon's Philadelphia office from October 1969 until August 1971, was trained to tell

prospective customers that Rio Communities property would develop in five to seven years. This time period was later changed to ten years (Tr. 16325, 16352, 16356, 16377, 16379). She was instructed that single family property would multiply three times, multi-family six times and commercial property ten times (Tr. 16325, 16378; see also Tr. 1935, 1940–41).

One sales representative who worked for Horizon from July 1969 until July 1974 (Tr. 2305, 2332–33), stated that a telephone solicitation used in the Washington, D.C. office to solicit in-home appointments would ask the prospect if he would be interested in an investment where you could "double or triple your money over the next six to eight years" (Tr. 2318–19). Sales representatives in the Washington, D.C. office used this six-to-eight year period until the District Manager visited Tucson in 1969 and came back and said to stop using six years so the period then became eight to ten years (Tr. 2352–53, 2355): "—if the company will allow you eight years to pay for this, somewheres at the end of this eight years, your property should be into the development stage. That's normally how most of us would answer it. It seemed to be a logical explanation which the customer would accept" (Tr. 2358). Sometime thereafter, this sales representative used a range of figures from 8 to 10 up to 18 to 20 years. "When I say 20, the people sort of lost interest, so I back off. I tell them anywhere from 16 to 18 years, something like that" (Tr. 2356):

Q. So the figure at which you began to perceive resistance from a customer would be twenty years; is that correct?

A. No, 18 (Tr. 2356).

A sales representative and later a sales manager, employed by Horizon from September 1973 to April 1975, testified that inferences arose from the Horizon promise to have roads in by the property in eight years that the property would be developed in eight years (Tr. 3732–33).

59. Horizon's "self-evaluative" documents, which report on surveys of sales offices which Horizon undertook beginning in 1973, revealed that representations were routinely made that Horizon's property was a short term investment, and specific time periods and profitability increments were mentioned. These representations are set out in detail in Findings 91–100, see especially CX 927L–M, O, 930C, G, 932E, F, 933, 936C, 942A, B, D, 943B, 944B, 947F, I, M, N, 948E, 949D, E, 950 E, I, K, 951E, G, I, 954. These internal survey reports reveal that older persons in particular were sold property on the representation that they would realize a profit during retire-

ment, or during their lifetime (Findings 91–100; see especially CX 927G, I, 935B, 936C, 944T, 947I, 949E, 950I, J). **[64]**

The survey documents reveal that it was routine practice to "trade" customers into multi-family property, or to trade customers into "better" locations which, it was represented, would result in a much shorter holding period and thereby enhance their profitability (Findings 91–100; especially CX 927E, F, H, 929D, F, I, J, K, 938D, 944E, T, 946H).

Testimony showing that Horizon officials had knowledge that Horizon's purported policy was not being followed in sales presentations can be found in the record. Mr. Nickeson, a regional manager in the Denver, Colorado area, testified that he realized practices existed in some of the offices under his supervision that were not in accord with his directives (Tr. 4529).

One sales representative who worked in the Chicago office from July 1972 until July 1973, and then transferred to the Phoenix office as a sales manager, testified:

> Again, a salesman was trained but once he left the office and went to a customer's house there were many things that happened that were not training. A salesman would say, if he became panicky and he couldn't make a sale, he would use whatever method of means necessary to try and make the sale. It was kind of in stages, he would kind of go into his regular presentation and if that didn't succeed he might get what in the trade we call "hot" and add little phrases of his own. (Tr. 3553–54).

According to this sales representative, the District Manager, Stan Drizen, knew of such activities (Tr. 3554). Another sales representative testified that Mr. Drizen departed from Horizon policy in almost everything he did (Tr. 3744). Another sales representative testified that on occasion Mr. Drizen stated that he did not care how the business was obtained, he wanted X amount of business on the books within a given time frame (Tr. 4674–75). Horizon's internal surveys of its sales offices revealed that the Phoenix Office, under Mr. Drizen's supervision, made numerous serious misrepresentations (Finding 93; see especially CX 939, 940–942).

One sales manager testified that the general practice for zone office's supervision consisted of why aren't you selling more (Tr. 1892).

Horizon received complaints from customers about sales representative's misrepresentations. On April 12, 1972, a customer wrote Horizon requesting a refund of the $460 which the customer had invested in Horizon property some six months previously. The customer stated:

> After careful investigation through numerous qualified sources we find that Horizon

Corporation has misrepresented the appreciation [65]time of eight to twelve years for land we purchased in the Rio Del Oro development. Our sources project a more realistic time of twenty to thirty years for noticeable appreciation to occur. (CX 907B).

Horizon's Operations Manager of Customer Service replied on April 25, 1972 and denied the request for a refund, stating in part:

We do not know what will happen to your property and I'm sure you do not know. The demand for development in your area could occur in many years less than an eight to twelve year projection. Then, it can take many years longer. . . . If I were you I certainly would not take the word of any other person in relation to what will happen to the property you personally own. You have purchased very fine property and I'm sure you will be most enthused about your purchase if you will visit your property. (CX 907A).

(6) *Customer Testimony*

60. Customer testimony confirms that sales representatives made specific representations concerning the profit that would be realized in the purchase of Horizon's land and the time period within which such profit would be realized.

Col. John Yuill, who invested several thousand dollars in Horizon land for his children's college expenses (Tr. 840), was told in November 1971, that he could invest a small amount of money to control the property (leverage), resell the property at a substantial profit in 2–3 years and use the profits to buy additional property (pyramiding) (Tr. 819, 822). Col. Yuill was told Horizon would "assist" him in reselling the property and there would be no problem in reselling (Tr. 822–23). He purchased seven residential lots in Rio del Oro at that time for about $5800 (Tr. 823). He later purchased a commercial lot in Horizon City because he was told there was a greater potential for appreciation with commercial property (Tr. 831, 845). He also purchased an additional Rio del Oro lot closer in to the developed area, which he was informed would appreciate in a shorter period of time (Tr. 839).

Burnice Carter, an individual who owned a dry cleaning business, purchased four residential lots and one commercial lot in Horizon City during February 1970, for $6,300 (Tr. 914; CX 691). The sales representative, a customer and a friend of Mr. Carter (Tr. 892, 907, 915, 940, 942), at the time of the initial contact was wearing a big lapel button emblazoned "MONEY" (Tr. 892). Mr. Carter, who was attracted by the lapel button (Tr. 892), was told that he could double his money on his purchase in five years, and could show an immediate profit of $150 per lot because the price on the lots was going up the next day (Tr. 893–94, 913). The commercial lot was represented to be more profitable than a residential lot (Tr. [66]912).

The sales representative stated that he would help sell the lots in about five years (Tr. 913). The sales representative called about one month later and informed Mr. Carter that he had a 24-hour exclusive on a commercial lot that would be a real good investment. The alleged exclusive was given to the sales representative as a bonus for leading the area in sales. The commercial lot was in a good location and there would be some money made on it, but if it were not purchased that night it would be grabbed up (Tr. 923). The sales representative stated that a thoroughfare would be cut through the property and the commercial lot would be on a corner which would make it tremednously valuable. The time period for profit was stated to be five or six years. Mr. Carter paid $9600 for this Horizon City commercial lot (Tr. 923–24; CX 699). This same sales representative came up with another 24-hour exclusive on another commercial lot, which he represented to Mr. Carter as a real good investment and there would be no problem at all in doubling the investment in five or six years (Tr. 931–32, 962–65; CX 704). After his sons-in-law visited the property and reported back to him, Mr. Carter wrote to Horizon to get his money back, but he was unable to get a reply. He stopped payments in 1971 after paying to Horizon approximately $5100 (Tr. 943–44).

J. D. and A. D. Oliver, twin brothers, were told in early 1975 that the lots they purchased in Horizon's Waterwood property would double in value in two years (Tr. 975–76, 977–78, 1052, 1055).

Allen Nesbit purchased three single family lots in Horizon City in July 1970 for $1,000 each (Tr. 1191). He was told that raw land appreciates at the rate of 20% per year and that the land would have to be held for seven to ten years (Tr. 1191–92). Horizon would notify Mr. Nesbit when there was a buyer available for the land (Tr. 1192). About two years later Mr. Nesbit was contacted by a sales representative who wanted to talk about the progress that had been made on the earlier purchase. The sales representative stated that the land had doubled in value (Tr. 1194–95, 1219–20), and that Mr. Nesbit needed to add to his portfolio and pick up some multi-family property. Multi-family property was represented to be more choice than residential property and that land was appreciating at approximately 20% per year (Tr. 1195–96). He was told that Horizon was opening up various parts of the land and development would occur in seven to ten years (1196). Mr. Nesbit purchased a multi-family lot for $4,600 (Tr. 1198). He later became concerned about his property and was short of money so with Horizon's consent he traded in his four lots for one paid-up lot (Tr. 1202).

Billy Cook purchased a lot in Horizon City in January 1972 for

$1300 and was told by the Horizon sales representative that the lot could be sold for $5,000 in five to seven years, although there was no guarantee that this would happen (Tr. 1159, 1182).

Michael Collum was told in July 1970 he would double his money by the time his purchase contract was paid out - eight years, ". . .or even as early as five years" (Tr. 1527–28). The sales representative also stated that there was to be a price increase right away so now was the time to buy (Tr. 1528–29). Mr. Collum purchased two lots in Horizon City for $2,000 (CX 751). In 1975, [**67**]after the Commission's complaint herein issued, Mr. Collum requested release from his contract. The matter was resolved by giving Mr. Collum a paid-up deed to one lot and a refund of $575 (Tr. 1539–40).

Jose Medina purchased two lots in Horizon City in November 1971 for $2,000 (RX 113; Tr. 4994), a price represented to be below the normal price of the lots (Tr. 4994, 5006). The sales representative stated that he could double his money in four years and that there would be no problem in reselling the lots at that time (Tr. 4995–96, 5009).

Helen Anderson, jointly with her sister Margaret Hayner, purchased 10 acres in Whispering Ranch in 1968 for $8,990 (Tr. 6176–77; RX 145–46). At the first meeting the sales representative stated that there was not much private land available in Arizona since the government owned so much of the land. The sales representative said the Whispering Ranch property was raw land but it had been engineered and utilities would be provided; Ms. Anderson assured by Horizon, that there was good water there and, with the demand for the property, it should double in value in 20 years (Tr. 6178, 6185, 6202). Ms. Anderson did not purchase the property on the evening of the sales representative's first visit, but asked for more information about Horizon's financial condition. The sales representative returned two days later with Horizon's financial statement and a contract of purchase was signed (Tr. 6180). According to the sales representative, Whispering Ranch would be comparable to the Sun City development outside Phoenix (Tr. 6179,6182). The lots which were purchased were represented to be on a section line and would be of greater value because they would have some commercial value (Tr. 6184, 6191). Ms. Anderson would at least double her money in 20 years, but by dividing the 10 acres into one acre lots, she could increase the value much more (Tr. 6216–17).

In 1969 Ms. Anderson visited Whispering Ranch by airplane, courtesy of Horizon (Tr. 6209; RX 149–50). The Horizon representative flew her over Sun City, a good retirement community, enroute to Whispering Ranch, and she only saw the property from the air (Tr.

6186, 6206). The Horizon representative stated that he hoped Whispering Ranch would be like Sun City eventually (Tr. 6186). In 1971 or 1972 Ms. Anderson made an attempt to sell the property through assistance from Horizon and through contact with a real estate agent, but was not successful (Tr. 6183). The Horizon representative advised her to keep the property since it was worth more than she had paid for it (Tr. 6190). In 1975 Ms. Anderson tried to get her money back from Horizon without success (Tr. 6187). After her refund request, a Horizon sales representative visited Ms. Anderson and attempted to trade the Whispering Ranch property for Rio del Oro property. The sales representative denigrated the Whispering Ranch property and stated that the Rio del Oro property would be a better investment (Tr. 6188–89).

Margaret Hayner, Ms. Anderson's sister, testified that in 1969, after the purchase of the Whispering Ranch property, another Horizon sales representative telephoned and asked for an appointment to talk about a "hot" property, a very good property (Tr. 6219–20, 6227). Ms. Hayner expressed a desire to purchase Horizon property **[68]**only through Mr. Fisher, the sales representative who had sold the Whispering Ranch property (Tr. 6220). The sales representative, Mr. Leibman, stated that Mr. Fisher could not sell this property and that it would not be available very long (Tr. 6220, 6227). The sales representative indicated that the investment could double in three to five years (Tr. 6220–21, 6228). Ms. Hayner and Ms. Anderson purchased two multi-family lots in Horizon City during June 1969 from Mr. Liebman for $2870 (RX 153). Mr. Fisher later advised Ms. Hayner that he could sell any property that Horizon had, and, since Ms. Hayner was unhappy about the purchase from Mr. Liebman, Mr. Fisher suggested that the property could be traded at a later date when other property became available (Tr. 6222).

Thereafter, in May 1970 Ms. Hayner went with Mr. Fisher on a fly-in trip to Rio del Oro (Tr. 6228), and upon returning to her home in Chicago area she and her sister traded the two Horizon City multi-family lots for six lots in Rio del Oro (Tr. 6222–23). The new contract was in the amount of $5,000 (Tr. 6224). Mr. Fisher stated that the Rio del Oro property would be a much better investment than the Horizon City property. It would be lived in within 10 years and would triple in value (Tr. 6225–26, 6231). The Whispering Ranch property and the Rio del Oro properties have been paid up and are owned by Ms. Hayner and her sister, Ms. Anderson (Tr. 6224).

In September 1968, Frank Simon requested a booklet from Horizon through a newspaper ad (CX 457 - "How To Successfully Invest In Real Estate"), and thereafter a sales representative called

on him (Tr. 6250–51). Mr. Simon purchased six lots in Horizon City for a total price of $2,034 (Tr. 6255). The sales representative stated that the property would be worth $5,000 to $10,000 in seven to eight years—at the time Mr. Simon's oldest child would be ready for college (Tr. 6256–57). He was further advised that Horizon would assist in the sale of the land (Tr. 6259). In 1972 Mr. Simon called on Horizon for assistance in the resale of his land. He received a kit containing sample advertisements. A second request to Horizon produced the name of an El Paso realtor (Tr. 6261). The realtor listed the six lots for one year (RX 160–62), but no sale was ever consummated (Tr. 6262). In 1975 Mr. Simon contacted another realtor who advised that there was no market for the lots (Tr. 6263).

In December 1971, Robert Pernini visited Horizon's offices in Chicago and purchased a commercial lot in Horizon City for $8,400 (Tr. 6292; RX 163). He was told that property increased at a rate of ten, eleven, twelve percent per year and it would probably continue in the future (Tr. 6289–90). He was told that the El Paso area would be a good place to start a business because of the cheap labor available from Mexico (Tr. 6291). Mr. Pernini was informed that his lot would be available for development in eight and one-half years; at that time, utilities would be available and he could open a commercial business (Tr. 6293–96):

> He just made it sound like it was a very excellent investment, the area was growing, that type of thing (Tr. 6297). **[69]**

Mr. Pernini was promised assistance in reselling the land (Tr. 6299–6300). Two or three years later when he asked Horizon for such assistance, he was advised that they would send him a sales kit containing sample newspaper advertisements (Tr. 6299). He also requested Horizon to repurchase his property but was advised Horizon could not do this (Tr. 6300). At the time of his testimony he was still making payments on his purchase contract (Tr. 6302).

Jing Jo Yu, a Korean American woman, testified that in January 1973 she saw newspaper advertisements in a Korean language newspaper in Chicago, Illinois. After being visited by a Horizon salesman, who was also Korean American, she purchased 15 lots in Horizon City for $13,800 (RX168; Tr. 6334–37, 6351). Mrs. Yu had been in the United States about two years at the time she purchased this property (Tr. 6336). She was informed by the Horizon sales representative that land was a better investment than savings accounts in banks or insurance (Tr. 6339–40, 6369), and that the land would increase at a rate of 20 to 30 per cent each year and it could be resold in two to three years (Tr. 6340, 6345, 6370–71, 6375). At the

time of the purchase, Mrs. Yu and her husband could read and understand very little of the English language (Tr. 6350). The sales representative inquired as to how much money Mrs. Yu had, and on being informed the amount was about $7,000, he selected the lots and the payment arrangements (Tr. 6352, 6353, 6373, 6386–87). Mrs. Yu made a down payment of $5,800 on the 15 lots (Tr. 6352). She visited her property about two months later on a fly-in trip and was very disappointed and depressed at what she saw—only sand and desert plants (Tr. 6353–56). The on-site sales representative said not to worry—"this place is going to be a shopping center. This place is going to be a school" (Tr. 6356; see also Tr. 6358–59). The sales representatives attempted to sell Mrs. Yu additional land at the completion of the property visitation, but without success (Tr. 6359–60). At the time of her testimony, Mrs. Yu was making payments on her property (Tr. 6363).

Irmtraut Vuletic purchased two single family lots in Horizon City during August 1971 after attendig a Horizon dinner party where at least one hundred persons were gathered (Tr. 6448–50). The price of the two lots was $3,000 (Tr. 6449). She was told that the property could very well double in value in seven to ten years, although this was not guaranteed (Tr. 6451–52). Mrs. Vuletic was visited by Horizon representatives in 1974 or 1975 who wanted to update her on her property. The sales representatives suggested that Mrs. Vuletic trade her two lots for some commercial property which would be more valuable than the residential property she had purchased. Mrs. Vuletic did not purchase any additional property (Tr. 6456–58). At the time she testified she was still paying on the property, but was considering stopping the payments after having paid in more than $2,000 (Tr. 6455).

James Devlin purchased four single family lots in Rio del Oro during January 1972 (RX 158C). The sales representative stated that the property would yield a guaranteed 10 percent per year return (Tr. 16624, 16654–56, 16659). The property would be developed within six to seven years and Mr. Devlin would have to either build on the property at that time or sell it (Tr. 15624, 166542–53, 16659). **[70]**

G. Representations Concerning Resale of Horizon Land

61. Training manuals used during the period 1968–1971 were silent as to specific representations that sales representatives could, or could not make with respect to how the property being purchased from Horizon could be resold, and whether Horizon would be

involved in the resale of the property (CX 160, 856, 956, 778, 957). After 1971, training manuals contained information to the effect that Horizon's policy was that it would not resell or buy back a customer's property, and that sales representatives should not make representations contrary to this policy. Sales representatives were instructed to state that the property was to be resold as any other property would be sold (CX 161, 180, 959B, 178, 158, 157–59, 163). As of 1973 Horizon had each sales representative pledge in a signed document not to represent that Horizon would resell, repurchase or lease any property from a customer (RX 81). Information about Horizon's resale policy was not part of the sales presentation, but was treated as a possible question that a prospect might ask.

CX 157, a training manual used in 1974 and subsequently, handled the resale problem as a possible question from a prospect, as follows:

> Q. Will you sell my lots for me? Horizon Corporation's policy at this time is such that we cannot do that. You would sell these lots just like you do any others. You'd place them in the hands of a Real Estate Broker either in that area or here, in your own local area. Or you can run an ad in your local paper. (CX 157V; see also CX 158U, 159Y, 163).

CX 158, a training manual used subsequent to the Spring of 1973, stated that "Mr. Prospect, Horizon will not sell your lots for you, or buy them back from you," as the suggested answer to the question "Will you sell my lots for me" (CX 158V).

CX 180, contained training on selected questions. In respect to resale of a customer's property, it stated:

> We may not offer to resell a client's property at any time. We cannot guarantee that he can resell it later. Our company *will* send him a resale package. This contains an approximate valuation of his property and some local real estate companies who may handle his property for him (CX 180S).

CX 161 instructed sales representatives not to promise personal or company participation in resale (CX 161Z5). This training manual answered a question about resale as follows: **[71]**

> Realtors, who just like right now in your own neighborhood, will be competing to list property (CX 161Z16).

CX 178, a training manual for use subsequent to May 1973, stated in answer to possible questions from prospects, that Horizon would not resell the lots or buy them back (CX 178W). The manual further stated that when the property was ready for development there should be no difficulty selling the property through the purchaser's own efforts (CX 178X).

CX 962, used until 1972, is a sales presentation based on the use of

FHA statistics. This presentation stated that resale of the Horizon property will be no problem—"the real estate market is enormous" (CX 962).

CX 783, a document containing rebuttals for certain objections that prospects might have to purchasing Horizon property, was used in several Texas offices during 1970–1971 to train sales representatives (Tr. 2155–58). It has the following statement:

> We are real estate brokers, specialists in land investment. I know that if we can be instrumental in getting you started in land investment, we will get the opportunity to resell your property. We live on commissions (CX 783C, D).

Sales representatives were trained to tell prospects that resale was not dependent upon actual development or use of the land bought from Horizon. Sales representatives were trained to make "the point (which is self-evident to [the prospect] once stated) that land usually sells many times in the years *before* its use" and repeated buyers and sellers can all realize a profit (CX 962; see also CX 622A).

Theodore Stone, a former Horizon Zone Manager, testified that sales representatives were initially instructed to inform customers that they should contact local brokers in the Albuquerque–El Paso areas to resell their property. At a later period sales representatives were instructed to tell customers they should write to Horizon headquarters and ask for a kit to give them various instructions on how to proceed with their efforts to resell their property (Tr. 2029–30).

Paul Boman, a sales representative and sales manager employed by Horizon from October 1972 until December 1974 (Tr. 4351–52, 4362), attended Horizon's National Sales Manager Training Program. At the training program the question of a resale program came up; the participants were advised by a high level Horizon official that a resale program was in the mill and would be in operation sometime during the next year - 1974 (Tr. 4361–62). Mr. Boman communicated this information to prospects in his sales presentations (Tr. 4362). Such a resale program did not commence as indicated (Tr. 4362, 4377–78). Another sales representative, Olin Hillman, who also served as a sales manager and district trainer and who attended the training program at Horizon's headquarters, testified that he also was informed by the same Horizon official that Horizon would have a **[72]**resale program in the future. Four other Horizon representatives from other sections of the country were present at the training session and heard the same statements about the resale program. Mr. Hillman attended a different session of the training program than did Mr. Boman. Mr. Hillman testified that he

used representations about the resale program in his sales presentations and communicated this information to other Horizon sales representatives and to his trainees (Tr. 4679–81, 4722–27).

Anthony Zimmer, an Horizon sales representative in the Chicago office from December 1970 until April 1972, testified that he was trained that Horizon's Customer Service Department would assist the customer in reselling the property:

Q. Mr. Zimmer, I didn't quite understand what you said about resale. Did you state that as part of your presentation you would tell people that Horizon Corporation would try to find a buyer if they wanted to resell?

A. They will assist in finding a buyer, yes.

Q. Did you also state that Mr. Steer made that statement in his presentation?

A. Certainly. Everyone did.

Q. Everyone that you heard give a presentation?

A. In fact, even in that training initially, that came out that we would assist someone in selling that property. (Tr. 6163–64).

Henry Fisher, a sales representative in the Chicago office from 1963 to 1973, testified that he represented to customers that Horizon would have a resale department by the time the customer was ready to sell the property (Tr. 6042, 6065–67).

Conversely, Daniel Nickeson, a former Horizon regional manager, testified that "We indicated that we didn't sell it when the question arose" (Tr. 4527; see also Tr. 16494–99). Other sales representatives testified that they made no statements about whether Horizon would or would not resell a customer's land (Tr. 1879, 4643). Although Chicago Zone Manager Tony Frederico testified that sales representatives in his zone were told not to represent that Horizon would assist in resale (Tr. 11761), one sales representative in the Chicago office testified that Mr. Frederico had a statement he termed "a good side-step" which was that if a customer wanted to sell, he wanted first crack at the resale (Tr. 6042, 6067; see also Tr. 11782–84).

62. Customers testified that Horizon sales representatives stated that Horizon would resell the land, or buy back the land, or would assist in the resale of the land, or that there would be no problem in resale of the land. **[73]**

Col. John Yuill asked a specific question of the sales representative about resale and was told that he would have no problem reselling the land—"People will be seeking that property. They will be coming to you to purchase it" (Tr. 822). He was also informed that while

Horizon was not in the business of buying back land, Horizon would assist in selling the land if the need arose (Tr. 822–23).

The Horizon sales representative stated that he personally would assist a customer, Bruce Carter, in reselling his Horizon land (Tr. 913, 959, 961). J. D. Oliver and A. R. Oliver were informed by the Horizon sales representative that the Waterwood lots they purchased would be resold by either the sales representative or by Horizon (Tr. 976–78, 1037–38, 1090–91). Allen Nesbit was told that development would be up to his four lots in Horizon City in seven to ten years and that Horizon would contact him when Horizon had a buyer for the property and then he could negotiate with the buyer to sell his land (Tr. 1192, 1219).

Michael Collum was assured by the sales representative that there would be no problem at all in reselling the property—"Just call me. I'm your personal representative. I'm in contact with El Paso daily, and if you decide to liquidate your property, we can handle it for you" (Tr. 1529). It was also indicated that Horizon possibly would be interested in the lots for building purposes (Tr. 1530).

James Madget traded in his three Horizon City lots for a Waterwood lot after Horizon representatives told him he could not resell his Horizon City lots, but that there were several real estate agents who would list the Waterwood lot which could be sold right away (Tr. 1403–04, 1408). Mr. Madget was told that if the real estate agents could not resell the lot, the sales representatives would get his money back for him (Tr. 1408). After several attempts Mr. Madget received names of real estate agents from the sales representatives. When Mr. Madget called, two of the agents just "laughed;" he could not locate the other agents. Thereafter, Mr. Madget contacted the sales representatives again and was advised that Horizon would send him a sales package that would assist him in the resale of his property. Mr. Madget thereafter received a package from Horizon containing sample newspaper advertisements. He tried newspaper advertisements without any success (Tr. 1409–10). The sales representatives finally agreed to get Mr. Madget a refund, but the sales representatives then left Horizon. Mr. Madget ultimately forfeited his property after paying out approximately $1,352 (Tr. 1411–13).

Carl Troyer testified that the sales representative during a reloading presentation, stated that there would be no problems in reselling the lots, that they were going up in price all the time, and that Horizon at certain periods was buying back some of the lots (Tr. 1339, 1371). Patsy Zecco was told Horizon would help in the resale of the lot Mr. Zecco purchased for his son (Tr. 1620, 1679–80). Mr. Zecco later purchased a Waterwood lot and was told by the sales

representatives that they would do all they could to sell the lot in the event Mr. Zecco wanted to sell it (Tr. 1633). Willard [74]Morgan was told by the Horizon sales representative, in response to Mr. Morgan's question about resale of the property in view of its remoteness from Mr. Morgan's location, that Horizon would provide help in selling his two single family Rio del Oro lots. "They will be developing this community. Perhaps they will even buy them back, but in any event they will assist you with a sale" (Tr. 1565).

David Krausse was told the method of resale of his Horizon property would be for builders to approach Horizon, who would indicate to the builders who the property owners were (Tr. 1721). Larry Cervenka was told that generally what had been done in the past was that when the property was ready for development a developer would contact the individual owner and purchase the lots (Tr. 1834–35). Ronald Nokes was advised that he would be approached by a builder desiring his commercial lot for combining with other lots to build a store of one type or another, or more likely to rent the property for such purposes (Tr. 4902).

The sales representative indicated to John Mossman that there would be no problem whatsoever reselling his Whispering Ranch lot either to Horizon or to future property owners once development began (Tr. 4863). Two or three years later he contacted Horizon about reselling the lot and was advised Horizon did not have a resale program at that time but were hoping to do so in the future. Horizon suggested newpaper advertising might be the best route to follow (Tr. 4865). Ivan Westcoatt was told that Horizon would not resell his property but that there would be no problem in reselling it (Tr. 4659). Jose Medina was told that his lots would be developed and if Horizon started developing that area he would be paid a legal or fair price for his lots (Tr. 4996).

Joan Wild was told that Horizon was going to start a shopping center immediately in the area where her commercial lot was located, and that she would be able to lease her property to a company that wanted to come into the shopping center (Tr. 5027–28). She also purchased two lots together to be located near a "highway loop" which the sales representative said would be ideal commercial property, and undoubtedly within a year or two an oil company would want the property for a service station (Tr. 5029–30). The sales representative also said that Horizon would have a resale office by the time the property was paid for and would handle any resale (Tr. 5030).

Melvin Bradley was told by the Horizon sales representative that he should retain the multi-family lot he had purchased and lease the

land for building purposes (Tr. 5165). Helen Anderson was told there would be no problem reselling her Whispering Ranch lot and that Horizon would help in the resale if she wanted to sell—"It was very vague" (Tr. 6182–83, 6212, 6207–08).

John Gothard attended a Horizon dinner party in November 1972 and purchased a single family lot in Rio del Oro for $3,000 (Tr. 6077–79). Shortly after purchasing the property he became dissatisfied with the purchase and contacted Horizon (Tr. 6079–80). In March 1973, a Horizon sales representative who identified himself as a "troubleshooter" visited with Mr. Gothard (Tr. 6080–81). **[75]**During this visit Mr. Gothard upgraded his property into two multi-family lots in Rio del Oro which cost $10,800 (Tr. 6081–82, 6186, 6101). The sales representative stated that the purchase of land was the way to make money, that land was a very, very fine investment, that Horizon was a land developer interested in promoting growth areas, and that Horizon wanted and welcomed the opportunity to resell the land, or Horizon would buy the land back and at the very least pay him what he had invested in the property (Tr. 6082–85, 6115–18). The sales representative did not mention a specific percentage of profit or specific time period:

> But he most emphatically emphasized that the community was a bustling, growing community. The place was just ripe. It was bursting for an influx of people. And this land that I was having—he would be very surprised if it didn't at least double its value in three years. (Tr. 6087).

The sales representative also stated that the price of the property was going to be increased and that alone would insure a certain profit (Tr. 6088). When questioned as to why Horizon was anxious to sell property that was rapidly increasing in value, the sales representative repeated that Horizon was a community developer and there was need for a "cash flow" to finance the communities (Tr. 6089–90). The sales representative also emphasized that the land was scarce and would be gone if Mr. Gothard did not sign that night (Tr. 6117).

Mr. Gothard became disenchanted with his property as time passed and in 1974 he contacted the Horizon sales representatives to sell his property for him, or buy back the property as represented (Tr. 6092–94). He was advised that he had a valuable piece of property and he should keep it and he would make a lot of money on it (Tr. 6094). He was also told that Horizon was no longer a land developer but now was engaged merely in the sale of land (Tr. 6095). Mr. Gothard ultimately discontinued making payments and forfeited his investment of $4,156 (Tr. 6096–97). Mr. Gothard later was visited

by Bruce Lehmann, a special assistant to a Horizon Vice President, who interviewed Mr. Gothard as to his reasons for forfeiting and promised to help Mr. Gothard get back some money (Tr. 6097–99). Mr. Lehmann later advised Mr. Gothard that Horizon had suffered a loss on the transaction and no refund would be made (Tr. 6100).

Frank Simon, who purchased six lots in Horizon City in 1968, testified:

> As far as selling the property, I asked that question specifically and was told that one, Horizon normally would be the contact point for anyone who wanted to buy property in that area and they maintain lists or knowledge anyhow of all the people who own the land or bought the land from them. And they would direct anybody who was interested in buying **[76]**land—they would let me know so we could make contact with that person. Also they indicated that they could help sell the land if I wanted at the time I wanted to sell it. They also helped their customers to sell the land. And I didn't get into a whole lot of detail (Tr. 6259).

Mr. Simon later wrote Horizon for assistance in resale and received a sales kit and thereafter the name of an El Paso realtor (Tr. 6261). He was unable to sell his property (Tr. 6262).

Robert Pernini was promised assistance in reselling his property. When he later requested assistance he was sent a sales kit on how to write a newspaper advertisement (Tr. 6299). Jing Jo Yu, a Korean American, purchased 15 lots in Horizon City from a Horizon sales representative who was also a Korean American. Mrs. Yu was told she could resell her property in two or three years and she should call the Horizon sales representative when she was ready to sell (Tr. 6345). Carmie Ottaviano was told that within six or seven years a developer would get in touch with him about his multi-family lot for which he paid $4800 and pay him $17,000 for it, or Mr. Ottaviano could have a six-flat apartment put on the lot where Mr. Ottaviano could live free. The developer would have a 99-year lease on the property after which Mr. Ottaviano's grandchildren or great grandchildren would own the property (Tr. 6410–12, 6424, 6440; RX 169).

Douglas Thornly was informed by the Horizon sales representative that he had never encountered a situation where anybody had any problems selling Horizon land, and that Mr. Thornly would have no difficulty selling his Whispering Ranch property because land values are always increasing and people are always looking for good investments such as Horizon land (Tr. 6480).

Elsie Colon was informed at the time she purchased two single family lots in Rio del Oro that Horizon might want to buy the land back because Horizon was a land developer and so many people were migrating into the area that Horizon would need land to develop for industry and homes (Tr. 16210–11). Anderson Austin was told that

Horizon would buy back the four single family lots he purchased in Rio del Oro. Mr. Austin readily accepted the premise that Horizon would be willing to buy the land back because it was also represented that the land was increasing in value (Tr. 16265–66, 16274–82).

Howard Gottesman testified that the sales representative made a definite statement to him that Horizon would buy back the Rio del Oro lot he purchased (Tr. 16673, 16691–696). Mr. Gottesman was later contacted by another sales representative in a reloading effort, and this sales representative also emphasized a buy-back by Horizon of the multi-family lot located in Canyon del Rio for which Mr. Gottesman traded (Tr. 16676). When Mr. Gottesman contacted Horizon in 1975 to effectuate a buy-back, the local Horizon office stated that under no circumstances would that be done and a newspaper advertisement in the Albuquerque area was suggested as a means of [77]selling the land (Tr. 16679).

James Devlin was assured that there would be no problem in reselling the four lots he purchased in Rio del Oro, that Horizon had an office in New Mexico that handled resales, and that Horizon would handle the resale in the event Mr. Devlin decided at a later date he did not want the property (Tr. 16625, 16655). Evelyn Tracy was told by the Horizon sales representative that she could resell her $800 Rio del Oro single family lot within a few months and realize $2–300 profit (Tr. 5923).

Horizon's internal surveys of its sales offices found several instances where representations were made to customers that there would be no problems in reselling the Horizon land (CX 929K), or Horizon's resale policy was vague (CX 927N), or outright representations were made that Horizon or the sales representative would assist in the resale of the property being purchased (CX 932E, 936C, 947L, 950E, G).

H. The Horizon Property Visit Credit and the Horizon Guarantee

(1) *Property Visit Credit*

63. Count XV of the complaint alleges that Horizon has represented, directly or by implication, that the travel allowances, "Property Visit Credit Certificates," or other allowances promised to purchasers by Horizon are either actual payments to the purchaser in the form of cash or checks or immediate deductions from the purchaser's currently scheduled payments, and that such payments or deductions are made upon completion of a visit to the purchaser's lot as reimbursement for the purchaser's expenses. In truth and in

fact, the complaint alleges, the travel allowances, "Property Visit Credit Certificates," or other allowances are deductions from the remaining account balance at the time the principal balance is equal to the amount of the allowance, provided that a company-guided tour is made within one year of the date of the acceptance of the contract, and that the payments due under the contract have been current throughout the term of the contract.

The contractual provision concerning the 5% property visit credit is found in the Receipt of Deposit and the Agreement for Deed:

> Upon confirmation and acceptance by Horizon Corporation or applicable subsidiary, Purchaser will be issued a Property Visit Credit Allowance Certificate in the amount of 5% of the cash price (net additional sales price in superceding sales). *** The Allowance granted herein is deductible from the remaining account balance at the time the principal balance is equal to the amount of the Certificate, providing that the personal inspection and company guided tour is made within one (1) year of the date of this Agreement and providing that the payments [78]due hereunder have been current throughout the term of this Agreement. (CX 139A, 140A, 148A, 149A, 150A, 151A, 152A, 153A).

The Agreement for Deed and Receipt of Deposit are signed by the purchaser as the time of the sale and copies of the documents are delivered to the purchaser.

Testimony by customers and sales representatives has demonstrated that the property visit credit is typically explained accurately to the customers and that there is no misunderstanding by the customers as to the requirements for earning the 5% credit allowance, or the time at which the credit is applied to the contractual payments (Tr. 4371–72, 4642, 6549, 6490, 6393, 4249–50). Likewise, there is insufficient evidence that Horizon failed to allow such credits when customers complied with the terms of the contractual agreement (Tr. 13352–54). Complaint counsel has proposed no findings to the contrary (see CPF 6.1–6.13).

(2) *The Guarantee*

64. As part of the property visit allowance, Horizon included in its Agreement for Deed and Receipt of Deposit a guarantee which provided that the customer was entitled to a refund of all monies paid in if, at the time of the property visit, the customer believed that the property had been misrepresented to him at the time of the initial sale and the customer requested a refund. To obtain a refund, the customer was required to fill out a refund request form at the time of the property visit and state on the form the circumstances of the misrepresentation. The on-site sales representative also filled out a separate report on the customer's visit (CX 908, 920B; Tr. 6211).

The request for refund was thereafter transmitted to Horizon's headquarters where a determination was made as to whether the customer was entitled to a refund pursuant to the guarantee. Richard Lovinger, Horizon's Vice President of Customer Services, testified:

Q. What was the policy of the company with respect to instructing field personnel in assisting customers in filling out that form or otherwise participating?

A. The instructions were that if the person wants a refund and can't satisfy an on-site exchange or anything else and he really wants it and says I want to make a claim, they were to furnish the claim and have the customer fill it out in his own handwriting, not the salesman and let the customer do it and send it into the office. (Tr. 13357).

Pursuant to this guarantee, Horizon officials sometimes granted full refunds, sometimes negotiated partial refunds, sometimes arranged an exchange of property, and sometimes denied a refund (Tr. 13367–63, 2360, 2370): "This is a discretionary thing" (Tr. 12983). **[79]**

The following are some responses to refund requests. CX 907A–B is correspondence in which Horizon denied a request for a refund based on a claim of misrepresentation made within one year of the sale where the customer had not visited the property. Horizon stated to the customer that he should personally visit his property within the one year period, and that he had purchased "very fine property." CX 908 and CX 920 represent correspondence whereby Horizon denied refunds based in part on the fact the purchasers had visited their property and signed the PVCC stating they were satisfied with their property. CX 921 is correspondence whereby Horizon denied a refund to a purchaser who visited his property within one year and filed a report claiming the property had been misrepresented to him. Horizon did not agree the circumstances stated by the purchaser constituted "misrepresentation."

Patsy Zecco, a customer who testified in this matter, was denied a refund because more than one year had passed before he made a request for a refund (Tr. 1654).

The Horizon guarantee is set out in the Agreement for Deed executed at the time of sale:

HORIZON CORPORATION GUARANTEE

Horizon Corporation or applicable subsidiary guarantees to refund all the money paid on your property if it was MISREPRESENTED to you at the time of sale. Requests for such refunds may be made only at the property upon completion of buyer's initial

company-guided personal inspection tour within one year of the date of purchase by stating the details on the company's refund request form. (CX 142–51).

This identical guaranteee also appears on the Receipt of Deposit, which is executed at the time of the initial sale (CX 139–40).

The Property Visit Credit Certificate ("PVCC"), which is mailed to the customer in the important document package several days after the property sale, has a bold heading "HORIZON CORPORATION GUARANTEE," and the following statement:

Horizon Corporation guarantees to refund all the money paid on your property if it was MISREPRESENTED to you at the time of sale. Requests for such refunds may be made only at the property upon completion of buyer's initial company-guided personal inspection tour within one year of the date of purchase by stating the details on the company's refund request form.

TO BE COMPLETED AT TIME OF PROPERTY VISITATION TOUR.

I have seen my land. It is as represented [80]and I am satisfied with my property investment. Please credit my account in accordance with this certificate.

Landowner(s) signature(s) _____

_____ _____

Authorized Horizon Representative Date

(CX 134, 136, 137).

In 1973 the PVCC form was changed to provide the following statement:

TO BE COMPLETED AT TIME OF PROPERTY VISITATION TOUR

I have visited the above described subdivision(s) and completed the Company guided tour. It is as represented in the Agreement for Deed, property report and state offering statement, public report or prospectus, if applicable. I acknowledge that I have relied solely upon the representations contained in such materials, that no guarantee of appreciation, resale or repurchase has been given and that the Company provides no resale services.

Landowner(s) signature(s) _____

_____ _____

Authorized Horizon Representative Date

(CX 133, 135, 138).

The heading of the document also eliminated the word "GUARANTEE".

In April 1974, the Horizon Receipt of Deposit form was changed to provide the following guarantee:

Horizon Corporation Guarantee

SELLER guarantees that the above-described property is as represented in the Agreement for Deed, Property Report and State Offering Statement, Public Report or Prospectus, if applicable, given to BUYER before or at the time of signing this Receipt of Deposit and the Agreement for Deed. BUYER acknowledges that he has relied solely upon the representations contained in each of said documents, that no guarantee of appreciation, resale or repurchase has been given and that SELLER provides no resale services (CX 141).

The above Receipt of Deposit [form revised 1/74] has the word "Texas" printed in the caption and may have been used solely with Waterwood sales. CX 152 is an Agreement for Deed [form revised 1/74] which has [81]the above "Horizon Corporation Guarantee," and the word "Texas" printed in the caption. (See also CX 153.)

Horizon's guarantee and PVCC were changed to a Property Visitation Acknowledgement ("PVA") beginning in 1974. It started with sales of the Waterwood property and gradually was phased in at all the properties (CX 141, 746–48; Tr. 13,363–366), apparently as late as 1977 (RX 981, 983, forms revised 1/77), well after the Commission's complaint herein issued, and well after the substantial sales of property which were made in the period 1970–1973 (Finding 23). Consequently, no findings are made with respect to the PVA which replaced the PVCC.

65. Paragraph 77 of the complaint alleges that the PVCC, as used by Horizon, is an unfair act or practice because it requires the purchaser to incur the expense of traveling to the property and taking the company-guided inspection tour, but (i) it is often not possible for the purchaser to see his land, and therefore not possible for him to make a declaration that he has seen it; and (ii) irrespective of whether the purchaser does see his land, it may not be possible for him to ascertain whether the property is as represented or was misrepresented at the time of sale, or whether he is satisfied with his property investment; therefore it is not possible for him to make a declaration that the property is as represented or that he is satisfied with his property or to set forth how the property was misrepresented at the time of sale.

While customers generally understood the procedure for obtaining the PVCC allowance and its application to the remaining balance under the contract at the time the principal remaining balance is

equal to the visitation credit, it was not understood by the customer at the time of sale that there would be a requirement that the customer state that the property had not been misrepresented and that he was satisfied with his property in order to receive the credit allowance. The record indicates that this aspect of the PVCC was not explained to potential customers at the time of the sale; there was no mention of this aspect of the PVCC in any documents or testimony.

66. The PVCC and the Horizon guarantee were utilized together by sales representatives as a sales tool. Training manuals provided instructions to sales representatives to use the PVCC and the Horizon guarantee at the time a close [sale] is being attempted.

CX 157, a 1974 training manual, states:

> Now, Mr. & Mrs _____ , I'd like to call your attention to these two important paragraphs.
>
> Trainee: Turn Receipt of Deposit towards prospects and point to Horizon Corporation guarantee and Property Visitation Credit Allowance and say: [82]
>
> And what they say is this, Horizon wants you to visit your property, in fact, we give you a Property Visit Credit Allowance of 5% to encourage you to visit your property and your guarantee flatly states everything is as described in our materials. Now, Mr. & Mrs. _____ you can initial it here to indicate I've gone over this with you, and you can intial it here to indicate I've gone over this with you, and you can use my pen . . . (Have the prospect initial on the border alongside the Horizon Corporation Guarantee).
>
> Trainee: At this point, the prospects may bring up a question, in which case you reply. Or they will simply initial as you have asked them to do. Although they have not yet signed anything, psychologically, they have accepted the program. It is now your job to solidify it by saying . . .
>
> Mr. & Mrs. _____ let me be the first to congratulate you on your wise decision. I know it will help assure that financial security we all want. (CX 157N, O, Z4, Z5).

This training manual also has the following suggested question and answer about the PVCC and the Horizon guarantee:

> Question No. 4 . . . IF I DON'T LIKE IT, WILL YOU REFUND MY MONEY?
>
> Answer: As it states on our Receipt of Deposit, Horizon Corporation guarantees that it is exactly as reported in all of our materials. So, quite frankly, Mr. and Mrs. Prospect, if you don't like it . . . don't buy it. In fact, Horizon is so proud of their properties and the way they are represented that Horizon offers a visitation allowance to encourage a personal inspection of your property within one year from the date of purchase.

A training manual in use in 1973 has the following question and answer:

> Question No. 4: If I don't like my lots, will you refund my money?

Answer: Mr. Prospect, if these lots are exactly as described to you, would you like them? (Yes.) Fine, I would like to point out the Horizon Corporation Guarantee spelled out here at the bottom of the Receipt of Deposit: (Read Horizon Corporation Guarantee verbatim.)

So Mr. Prospect, you agree that you do like these lots if they are exactly as described. And if they [83]are not, you are fully protected by the Horizon Corporation Guarantee. (CX 158W)

CX 161, a training manual used from 1970 through 1972, has the following instructions for trainees on the use of the Horizon PVCC and guarantee:

LET ME SHOW YOU HOW YOU CAN CONTROL THIS PROPERTY OVER THE NEXT 7 to 8 YEARS AND EXPLAIN TO YOU THE HORIZON GUARANTEE.

(You must sell—not merely explain— but sell . . . the Exchange Privilege
the Horizon Guarantee
the Property Visitation Allowance
the Terms
as if it were the most fantastic opportunity ever presented to them—because *IT IS.*

(CX 161Z6).

CX 160, a training manual used in 1970 and thereafter, has the following presentation on the guarantee and the PVCC:

Here we have the Horizon Corporation Guarantee and it says Horizon Corporation or applicable subsidiary guarantees to refund all the money paid on your property if it was misrepresented to you at the time of sale . . . . Now, Mr. Jones, this doesn't mean that I would have to tell you that there are blue gardenias growing on your property; right now, it's plain old cactus, rock and dirt, sort of ugh, but, this means the facts of the property potential that I have told you. What it boils down to is this. If everything I have told you is true, the property is going to make you money, right. (CX 166–Z–4) And, if I have told you anything that is untrue, you are going to get your money back. Now do you see anyway you can lose on a deal like that? And Mr. Jones, we want you to take a look at your property . . . That is why Horizon allows you 5% of the cash price to go take a look. Now Horizon is not a benevolent society. We don't offer this 5% because of our good heart. Of the people who go to visit their property, a very large percentage end up buying more property. They become multiple property owners. Mr. Jones, it's not just a gift on Horizon's part; it's really good business.

Now, Mr. Jones, I'd like to ask you a question. Do you think this property will make you money? Well, then all I will need is your approval right here, and we will put you on the track to making some money. (CX 160Z4–Z5).

Similar statements are in other training manuals (CX 781A, 782A, 161Z–13, Z–14, 159Y, 163K, L, Q, W, 178Q, X, 180Z–21, 905L, M, [84] 956Z, CX778Z–41). CX 957 refers to the PVCC as the money-back guarantee if misrepresented, and the property exchange privilege is termed the "Company Format For Making The Investment Attrac-

tive" (CX 957A, E, F). CX 778Z–48 states that Horizon is offering "*full year* guarantee—*money back* if dissatisfied". CX 778Z–49 also refers to "a full year money-back guarantee." The Leif Erickson and Merv Griffin films mention that the sales representative will provide information about "how you are protected" by the Horizon guarantee (CX 526U, 527Z–22).

Sales representatives used the guarantee and the PVCC as sales aids in making the initial sale. Theodore Stone, a former Horizon Zone Manager, testified:

> . . . the obvious objection was going to be I want to see it before I buy it.
>
> And, we had a money back guarantee, and a property visit credit allowance, and an exchange privilege in the body of that contract. And, those three conditions were used to overcome and get the guy to buy right now, in sight unseen; but he could exchange it. You were going to get 5 percent down if he bought before he went, and if it had been misrepresented to him he got his money back, so what did he have to lose? (Tr. 1936; see also Tr. 1938–39).

Horizon's internal surveys of its sales offices found evidence that customers understood the Horizon guarantee to be "unconditional" (CX 935C).

(3) *Property Visits*

67. Customers made property visits on their own (Tr. 827–28); others visited the property in highly organized fly-ins conducted by Horizon (Tr. 4363–66, 6353–60, 16215–22, 16245, 16471–73; see also Finding 37). These property visits were utilized by Horizon not only to cement the first purchase, but as an opportunity to sell additional property (Tr. 16478–80). Testimony by sales representatives and customers reveal the success of the property visitation program in making additional sales (Tr. 4365, 6223–24). This testimony also establishes that customers were unable to see their property at the time of the visit, that they were unable to evaluate the investment quality of the property they had purchased, and that they were unable to determine whether the property was misrepresented at the time of the initial sale. Also, customers understood at the time of the initial sale that the Horizon guarantee was a money-back guarantee; that is, that customers could get their money back if they were dissatisfied with their property at the time of a property visit if made within one year (Tr. 1496–97, 6207–08, 6491–92, 6549, 6556–57). Some customers were totally dissatisfied with their property but hesitated to demand their money back (Tr. 1200, 1497, 6360–61, 6392–94, 6489–92, 6555–56). One sales representative and sales manager, employed in Horizon's Denver office from October 1973

through December 1974, described Horizon's guarantee as follows: [85]

> Most of them [customers] had a year's guarantee to go out and look at the property, and for any reason, they could get their money back if they weren't satisfied with what they saw. (Tr. 4364).

Customers at the time of the property visit were given a tour through the core area where there were homes, apartments, commercial activity, golf courses and other indications of development activity. One sales representative described a property visit as follows:

> [You] would escort them on a guided tour. In other words, through the industrial park, Horizon Manor [a developed area], out to their property, show them where it was, get them out and walk on it if they wanted, then put them back in the car, bring them back, finish with Horizon Heights [a developed area], show them a few model homes, bring them back to the office and usually they would be satisfied with what they had and one of the reasons for the trip to look at the land was they had a PVC, Property Visit Credit allowance. You had them sign that.
>
> Then as long as they were there, they were happy with it, then you tried to sell them additional land. And that's about it. (Tr. 2328).

This salesman testified that he received ¾ of 1% of the value of the PVCC for conducting the property tour (Tr. 2330). He also testified that all lots in Horizon City could be visited by four-wheel drive vehicle, and that all lots were not staked (Tr. 2360–62, 2342).

William Kelly, who was employed by Horizon from March 1971 until April 1975, served as a fly-in coordinator for one year, and then as the on-site PVCC validator for Paradise Hills. He also was a sales manager for Horizon's New Mexico properties with his office in Paradise Hills (Tr. 16540–42). In conducting fly-ins, Mr. Kelly testified that he controlled all the social activities, meal functions and tour schedules for the fly-in customers (Tr. 16,544). He would separate out those customers or friends who were likely to have a negative impact on sales during the tour (Tr. 16543; see also Tr. 16471–73, 16478–80). Participants in the fly-ins were always shown the Paradise Hills property (Tr. 16542, 16222), and told their property would look like Paradise Hills when it was developed (Tr. 16222). He also testified that the lots were not staked in Paradise Hills and that he could take some customers only within a half-mile to a mile of their lots (Tr. 16545). Lots were sometimes staked by sales personnel without benefit of surveyor supervision so [86]that the accuracy of such staking was open to question (Tr. 16544; see also Tr. 2342).

Theodore Stone, a former Horizon Zone Manager, stated that he

was selling to people in Dallas, Texas and ". . . if they did not know anything about property values in Dallas, what were they going to accomplish by going and spending the week in El Paso? What would they be looking for?" (Tr. 1938).

Barbara Kelly, employed as a sales representative, sales trainer and sales manager in Horizon's Philadelphia office from September 1969 until September 1972 (Tr. 16420–25), thereafter moved to Albuquerque and became a sales representative selling homes on-site. Prior to moving to the Albuquerque area and while she was a sales representative she visited Rio Communities between 5 and 7 times on fly-in trips. She testified that it was only after she moved to Albuquerque permanently that she began to question the accuracy of the information she had provided to sales trainees and customers:

Q. What information did you learn while you were living in Belen which led you to question what you had previously told people?

A. That there was no way that that land, on that scope, could ever make money on it in anybody's lifetime or for the purpose that I was selling for somebody's children's education or for their retirement.

The whole scope of the Rio Communities compared to the size of Albuquerque and what was actually going on in Albuquerque, the type of development, compared to Rio (Tr. 16531–32).

On further cross-examination she amplified this testimony:

Q. How long before you were there, the first ten minutes when you were there or the first week?

A. I was down there for three months and during that three-month period is when you realized how much 100,000 plus or 200,000 acres is. (Tr. 16534–35).

Horizon's booklet, "How To Successfully Invest In Real Estate," stated that ". . . many of the important investment factors cannot be evaluated by mere visual inspection" (CX 740, p.13).

Customer testimony described vividly what occurred on property visits. One customer, Allen Nesbit, described his property visit as follows:

A representative met us, and he talked to us a little bit, and he tried to sell us some more [87]property, and we weren't interested. He took us to a car . . . and he drove us back to the club house and golf course, and we took a tour of it. And, then, he took us over to some model homes and showed us a sample of each of the various classifications. Then, he drove us around the homes that were already built some more, and finally, he said he would show us where our property was. And, he drove out to where there was no development for a while, and he stopped the car and said, "Your property is over there." And, my wife was disappointed because she wanted to stand on it. She had seen all these brochures they sent us of people actually standing

on their lot. And, the Horizon representative said, "Well, it was too hot and it was too far away, and he needed to get back." So, he said, "It's over there and it all looks the same now." It was all brush and desert type land. So, he drove us back to the central office, and we left after that. (Tr. 1200).

Q. . . . Would you kindly tell us your best estimate as to how far the core area, from the developed area, your lots allegedly existed?

A. Well, it was difficult to tell because he didn't go in a straight line. He detoured down to show us where they were putting the industry in, showed us the water tanks, and went back, and I would say it was anywhere from five to six miles, something like that, on a straight line to where he stopped the car and he pointed out and showed us that our property was out this way.

Q. Was any of the property staked out there?

A. I didn't notice any.

Q. Did he say anything about the development of the core area there coming toward your property at all?

A. He said it was moving in a rapid rate and was coming out that way. (Tr. 1201; see also Tr. 1490, 1537).

A customer, Billy Miley, testified that he and his wife were disappointed at the distance of their lots from the developed area, which was much farther out than he had anticipated. The sales representative stated that he owned some lots out there and that he felt real good about it. Mr. Miley and his wife then discussed the property and decided it was not a good investment but that it could be traded. He testified that they could not think of any misrepresentation that had been made the night of their purchase, so they signed the PVCC and received the PVCC credit (Tr. 1497). [88]

Carl Troyer was driven by the Horizon sales representative to within one mile of the second lots he had purchased from Horizon, but that there was no way he could be driven to see the first lots he had purchased ". . . we would need to take a jeep or fly over it or something" (Tr. 13443–44). Mr. Troyer estimated the second lots to be 3 to 4 miles from the developed area and the first lots to be 7 to 8 miles from the development area (Tr. 1347). Mr. Troyer testified that the sales representative:

. . . indicated that the streets would be built there shortly out to where our first—our second two lots which were purchased in 1972, that the grading was being done at that particular time and that the roads would be built in the very near future and to be started in the next few months, and that was the area in the direction in which the development was being extended, and that it was the primary—in the particular division there that we were looking at. The streets would be built in the immediate vicinity of the present development out to and beyond where the lots were we had purchased. (Tr. 1346–47).

At the time Mr. Troyer purchased the second lots the sales representative as an added inducement gave Mr. Troyer a PVCC for the first lots he had purchased some two years earlier (Tr. 1338, 1353, 1388). The on-site sales representative validated both PVCC's (Tr. 1344), but Horizon subsequently did not allow a credit for the first purchase because the property visit was beyond the one year period (Tr. 1360).

David Krausse visited Rio del Oro too late in the day to take a tour of the property, but he made arrangements to have his PVCC validated by the Horizon sales representative (Tr. 1710, 1772). Mr. Krausse drove around the core area on his own and he testified that there was less activity there than he had imagined, based on what the maps appeared to indicate (Tr. 1776–77). He also testified:

> I bought it as an investment property. There was nothing I could really discern about it being a good or bad investment, based on what I saw (Tr. 1777).

Col. John Yuill visited his 7 lots in Rio del Oro during March 1972 and was driven several miles over a bladed road to an area where the sales representative pointed and indicated the lots were "somewhere in that area" (Tr. 828). Col. Yuill expressed concern about the distance from the core area to his lots and doubt about his ability to sell the lots at a profit in 2 to 3 years. The sales representative told Col. Yuill to have some imagination about vacant land, that growth can occur very rapidly, and then the land will appreciate (Tr. 829). Col. Yuill had also purchased a commercial lot **[89]**in Horizon City which he attempted to visit on that same trip. Col. Yuill was given the general location of the lot and was told he could drive "close to it." Col. Yuill drove an estimated 15–20 miles from the core area and looked in the direction where he assumed the property was located (Tr. 832–34, 865–67). On a second property visit in 1973, Col. Yuill purchased another lot which the sales representative said was closer to the developed area and would appreciate in a shorter time (Tr. 839).

Mr. Melvin Bradley visited Rio Communities but did not see his property; he was mainly interested in the visitation credit which he received: "That particular time we still had a good deal of faith in the possible development of the area, I would say that" (Tr. 5177).

Jose Medina visited his property in Horizon City and was shown the shopping area, the development area, the industrial area, the golf course, the homes being constructed and finally was driven out to his property. When Mr. Medina stated that his property was supposed to be only four miles from the developed area, the sales representative indicated that he had not taken a direct route from

the developed area to the lots. Mr. Medina did not see any stakes or other identification of the property he was being shown (Tr. 4999). Mr. Medina was also told by the sales representative that he could trade the property for Colorado property, which was what Mr. Medina had been told at the time of the original sale (Tr. 4999, 4993–94, 5012, 5020).

Jing Jo Yu, a Korean American woman, with her husband purchased 15 lots in Horizon City for $13,800 (Tr. 6351). About two months after making this purchase, Mrs. Yu and her husband visited the property on a fly-in (Tr. 6353–54). Mrs. Yu expected the property to look like Los Angeles because of the Merv Griffin film she had been shown by the Horizon sales representative (Tr. 6342–43, 6355), "but when you were down there it was just no water, I mean it was just desert, just sand with just small trees—" (Tr. 6355). Mrs. Yu and her husband were very depressed (Tr. 6355–56), but the on-site sales representative said "don't worry . . . this place is going to be shopping center. This place is going to be school" (Tr. 6356, 6358). The sales representative attempted to sell the Yu's more property but they adamantly refused (Tr. 6359–60). Mrs. Yu testified that they signed the PVCC because she did not understand the contract and because she had to sign to have her payments reduced by the $690 property visitation credit (Tr. 6360–61, 6392–94).

Douglas Thornly purchased a 5-acre tract in Whispering Ranch in 1970 (Tr. 6479). In October 1971 a Horizon sales representative visited with Mr. Thornly to tell him about a new area Horizon had just opened up (Tr. 6480–82). He traded the Whispering Ranch property for three multi-family lots in Horizon City because it was represented to him that he would need three lots in order to construct a multi-family dwelling unit (Tr. 6483). Mr. Thornly visited his property within one year to gain the PVCC credit (Tr. 6487–88). A sales representative took Mr. Thornly through the developed area, through a couple of model homes, through a park, and to the lake "which in essence ended up being a mud hole" (Tr. 6488). The sales representative then drove north to where the road ended **[90]**
"He stands there and he points north and he says it's a couple miles that way" (Tr. 6488):

Q. Was any of the property staked at all?

A. Near to the clubhouse it was. But the impression that I got and from that sales aid that Jerry Steer used was that this was all staked, it was platted, it was laid out, the ground was leveled and there were rough roads in there at least.

At the time, my wife and I were somewhat despondent about that. And we went back, sat down and talked about it, and Charles Connelly [the Horizon on-site sales

representative] basically told us that the construction is going to be moving up that way. That you just bought it the other day and that it doesn't look like much now but in three to five years, this is going to be a bustling community. And went on with the sales pitch and it seemed even more intense to me than even what Jerry Steer [the Horizon Chicago sales representative] had purported. So my wife and I, somewhat reluctantly, agreed and said okay, all we can do is just hold on to it and wait.

The whole gist of the matter of this thing is that whatever the salesman tells you, or any representative tells you especially about land and investments, one must let time pass before you can prove or you can bear out the fact that they said whether they're true or they're false.

Q. Did you sign a visitor's certificate there?

A. Yes, we did.

Q. Now, you've touched on it already but you mentioned you were despondent and you didn't see what you thought you were going to see apparently, I gather. What were your reasons for signing the certificate?

A. Well, it seemed that—when he had the certificate he says look, you can get, I believe it was $865 [$585 is correct amount] is a lot of money, and you know your contract will be up quicker. And he said before you even reach the end of your contract, this land is going to be developed and this is going to be a bustling community and on and on with his sales pitch. (Tr. 6489–90).

* * * * * * *

[91]JUDGE BARNES: Did you know at that point you could rescind?

THE WITNESS: Well, basically, he didn't say if you wanted to back out you can back out. He was on the very positive side saying this is a good reason for holding on to it and just talking about how the construction was going and so on. We knew that we could back out before that. He didn't really press that issue, but we knew when we were there that Horizon would refund your money.

By Mr. Kaplan:

Q. Who told you they would refund your money?

A. Jerry Steer.

Q. How would you get your money back, did Mr. Steer say?

A. He said if you weren't happy in any way, shape, or form with Horizon and the land and that anything that he had said was untrue that we would get our money back. (Tr. 6491–92).

On cross-examination, Mr. Thornly was asked if he understood that he had a right to a refund if the property had been misrepresented to him. Mr. Thornly again emphasized the difficulty of determining if the property had been misrepresented:

Yes. Now, basically, I'm sure the point you're getting at, is the fact that it was

misrepresented. You can't tell with land five days after you purchased it if you've been misrepresented to the fact of what the actual value is, if the construction is going up there up the main artery that he had mentioned so on and so forth. (Tr. 6528).

After writing to the Department of Housing and Urban Development, Mr. Thornly received a refund of $4,368 and Horizon kept $828 (Tr. 6503).

Elsie Colon purchased two single family lots in Rio Grande Estates of Rio Communities in 1971 for $4800 (CX 965). She was told that she could visit the property and it would not cost her anything because Horizon would give her credit for the trip when her property was paid for, which would reimburse her for the monies spent on the property visit (Tr. 16215). She made a visit on a fly-in trip (Tr. 16221), but she did not see her property because the road had not been completed: "He said it was all alike. It all did look **[92]**alike" (Tr. 16215). Mrs. Colon was told that her lots were in the process of being developed right at the time of her visit (Tr. 16216–17); that Paradise Hills at one time was exactly like the property she had purchased, and that her land would be the same as Paradise Hills when it was developed (Tr. 16218). She also was told that her land would be developed in the very near future and that down the road a supermarket was scheduled to be built (Tr. 16219). In the closing room at the property site Mrs. Colon was offered multi-family property which was termed very important property because one would need multi-family property in order to build anything over a one-story single family house. It was stated that the property could only be offered to Mrs. Colon because of her property visit; she could not receive this offer after she left the property. Furthermore, she was told she was getting a very reasonable price. (Tr. 16216–17, 16220–21).

Mrs. Colon was questioned as to why she agreed to make the second purchase:

JUDGE BARNES: Mrs. Colon, you said you were a little disappointed in your first purchase and you said you couldn't afford it. Why did you buy it?

THE WITNESS: Because I felt I was really under pressure and I was in that little room for a long time. They explained to me when I was disappointed in the land, that the land would be developed. They showed me Paradise Hills. It was beautiful, it really was. The communities were beautiful. This is the way mine would look after it was developed (Tr. 16222).

Mrs. Colon did not sign the agreement to purchase the multi-family property until she returned home from the property visit and

received her husband's approval of the purchase. The purchase price of the lot was $2700 (CX 966; Tr. 16239–42, 16260). Mrs. Colon stopped payments on her property after paying in approximately $5,800 (Tr. 16224–25).

Austin Anderson purchased four lots in Rio del Oro during February 1972 for $3,800 (Tr. 16266–67, 16284). The sales representative stated that Horizon would refund the money if after taking a property visit, Mr. Anderson was dissatisfied with the property:

> Well, during the time that we were trying to—he was trying to make the sale and he was saying that later on Horizon would buy it from you. This is if you are dissatisfied to go out to New Mexico and look at it. You could make an application on the spot to get your money back if you were dissatisfied. (Tr. 16265). **[93]**

Mr. Anderson was also told that Horizon would repurchase the property if Mr. Anderson ever wanted to sell the property. Mr. Anderson never visited his property but he did try to get Horizon to repurchase the property, without any success (Tr. 16265, 16279–80, 16282–86, 16288).

In the case of Whispering Ranch, a property visit was normally conducted by an airplane flight over the property, which included a flight over Phoenix and Sun City before arriving over Whispering Ranch. A sales representative employed in the Phoenix office stated that the Phoenix office was responsible for conducting property visits to Whispering Ranch. It had a four-wheel drive jeep for this purpose although the most prevalent way to visit was by airplane (Tr. 3516). This sale representative described an airplane visit to Whispering Ranch:

> We would meet, especially out-of-towners, at the airport or they would meet us at one of the offices or at the office and we would take them in a small plane, we would fly over the property in a pre-arranged pattern to point out the best of the property in its relation to the city.
>
> Q. When you say pre-arranged pattern, could you kindly explain to his Honor what that pattern included?
>
> A. Well, yes, we would come off of the Sky Harbor Airport and go north towards Sun City making sure to fly over Sun City, which has the closest proximity to the property of any major area, with the exception of Wickenberg, then we would proceed to go along Grand Avenue, crossing over the Rose Farms and the nurseries, all of the way up into Wickenberg itself, and then fly west towards Las Vegas to the Vulture Mine road, passing over the Rancho de los Caballeros over there and then over the view of the property, and then back down the same route (Tr. 3516).

This sales representative testified that he participated in two property visit flights over Whispering Ranch and that on each occasion the Vulture Mine, which is the most easily identifiable

marking in the area, is used as a guide and the customer's property on both occasions was identified as adjacent to the Mine area. According to this sales representative the same property was pointed out on each occasion. He further testified that the Whispering Ranch property was not staked (Tr. 3518–19).

Mrs. Helen Anderson purchased a 10-acre parcel of land in Whispering Ranch in 1968 (Tr. 6176–77). The sales representative **[94]**advised her that she had one year to decide if she did not like the property she might get a refund (Tr. 6208). Mrs. Anderson visited her property by airplane in 1969. The Horizon sales representative took her to lunch and then they flew over Whispering Ranch passing Sun City enroute "which was very lush and green" (Tr. 6186). The sales representative pointed out a lot in Whispering Ranch to Mrs. Anderson and told her that he hoped Whispering Ranch would be like Sun City eventually (Tr. 6186). Mrs. Anderson could not see any markings from the air (Tr. 6187). Mrs. Anderson signed the PVCC:

Q. And you signed these under the statement which says "I have seen my land. It is as represented and I am satisfied with my property investment"?

A. I signed with the thought that he told me that the development would be like the [Sun City] development. I knew that couldn't probably have been done in a year's time with raw land. That was obvious.

Q. And did you have any reservations when you signed that certificate?

A. Yes, in one sense I did. Because of being from the Midwest here the business of seasons—it is hard to know when you see desert land what can be done with it. (Tr. 6209–10).

Mrs. Nancy Tweedy purchased a 5-acre parcel of land in Whispering Ranch. She later visited the property by jeep. Her experience on this property visit is graphically stated in her testimony:

He used a jeep, a very old jeep. He also carried about three or four gallons of water in his jeep. Never being to the southwest, I didn't know why. He says oh, in the desert you always have to have water because if you get lost, then you could be stranded for days and die. So, to me, it seemed a little unusual because I thought we're just going 30 miles from Phoenix.

Well, we started on our journey, and we drove west awhile. And I said, well this is supposed to be 30 miles. How come it's taking so long? Well it's 30 miles as the crow flies. So after maybe an hour, or a long period of time, we came to Sun City. But before we hit Sun City, there was nothing or just little towns, if you even call them a town, one or two gas stations or store in the middle of the desert. About this time my husband and I were getting suspicious. We thought—I don't believe this as being **[95]** represented to be 35 miles or 30 miles from Phoenix.

So, we hit Sun City and then we kept going another long period of time, and we got to

this town called Wickenberg, which was more of a town. It wasn't a big town, very small town.

So from there, we went off of this main road into sagebrush, cactus, and mountains. There was no indication where we were going, no signs saying, "Future site of Whispering Ranch." There was just nothing there.

Then we passed this place called The Vulture Gold Mine, but we kept driving. And finally he stopped somewhere in the middle of this desert. And we said, well is this Whispering Ranch? And he says there aren't any signs up. There were no stakes, no indication that we were even at this place called Whispering Ranch. We said, where is our site and he said, well, I don't know, somewhere around here. This was a vast, waste land. We don't know where we were standing. We don't know if this was Horizon property or if it was—if this was what we purchased. There was just nothing there, nothing.

JUDGE BARNES: Was this as far as the road went?

THE WITNESS: Oh, there was no road. We had to get off of a road and go just—well, maybe it was a road but it sure didn't seem like a road. It wasn't a paved road. I wouldn't call it a road. It just went off into this desert.

And at that time, we were quite astonished, you know. And so then we made this trip back into Phoenix. I would say it was about two to two-and-a-half hour ride each way. So we knew that we weren't interested in this property. And we were just horrified that we had given someone money for this, if it was even belonging to us cause there was nothing there. (Tr. 6552–54).

Mrs. Tweedy signed the PVCC:

Well, we said no, we do not want this land. There is nothing there. We want our money **[96]**back. This was false advertising, misrepresented from the word go. And this gentleman said, I'm sorry, we don't give money back. You can only get money back if you apply it to more Horizon property elsewhere for more money. Well at that time, we owed, I think, $1,800 left. He says, well if you don't pay for this or sign this agreement, you'll lose all the money you put into it. By that time, we had quite a bit of money involved. We didn't know what to do. If we didn't sign, we'd lose our money. If we signed, it was like we were okaying what we saw, even though we didn't want that. But we did not want to put any more money into Horizon because they had cheated us out of all that money, misrepresenting all the way along. But we didn't know what to do.

Reluctantly, we signed. (Tr. 6555–56).

I. Reloading Customers

68. Horizon has stated that over 50% of its sales were to existing customers (CX 66C), a sales method termed "reloading" (Tr. 1999, 3770). Reloading takes two forms, "one is to sell them additional lots, the other one is combining their equity along with the purchase price of the new lot and refinancing the whole thing" (Tr. 2314).

Sales representatives were trained at reloading existing customers and were very successful at this sales technique. One sales representative testified that 75% of his sales were to existing customers (Tr. 3745); another testified that 60% of his sales were to existing customers (Tr. 4365); and a third testified that 50% of his sales were reloads (Tr. 3777). Sales representatives were trained to avoid overloading customers on the first visit—"you can always *come back with additional lots, if* and *when* they are allocated to your office" (CX 161Z3).

Theodore Stone, at one time a zone manager for Horizon (Tr. 1901–03), testified that Bill Cook, who later became Horizon's Vice President for Sales (Tr. 13523), trained him ". . . to keep the down payment and monthly payment as low as possible, and come back later with higher prices of property" (Tr. 2001). He stated that the practice during his entire tenure with Horizon was to reload existing customers. First you attempt to sell them additional property. If this is not successful, you attempt to use their existing purchase equity to refinance additional and more expensive property (Tr. 1999–2002). One sales representative testified: "We, as salesmen, were interested in the commission sale. We went for the up grade" (Tr. 3745).

Marc Knasel, a salesman, district manager and later Director of Training for Horizon (Tr. 3751–56), testified about the training of the sales representatives in respect to reloading: **[97]**

> I in all cases trained them to first of all go through the customer's existing property information, ask for the customer's papers, get it out and go through it, answer questions that the prospect might have about that property. In some cases they had been to the property and seen it. And then to bring out from the kit any of the new updated materials about that customer's piece of property because there were generally new folders or new pieces of printed material from Tucson often-times that would relate so it gave the customer an update of sorts on the property he had. And then to discuss the difference in what the customer paid for his lot and then to show the list price, the current list price of the lot, to illustrate, if there had been a posted increase this would give a good illustration of an increased price to that customer. The intent there was to impress them with the value increase of what he had bought. This is how we trained them and then to follow that by a new sales presentation on an additional piece of property. That is how we trained them (Tr. 3776–77).

Before going on reloading calls, salesmen obtained computer cards from their office which showed the location and price paid for each lot the consumer owned. Using information obtained from Horizon's price books on each lot, the salesmen contacted customers to tell them the value of each lot at the time of the sales call in comparison to the original price (Tr. 3528, 4684–84, 16,448). The "value at the time of the sales call was almost always higher than the price paid (Tr. 3529). One sales representative testified—

We would figure out in the books that we had, the cost books, how much more additional land they could buy to keep their monthly payments the same by extending the time they were paying, using their equity as a down payment. . . . You would go out to a customer's home with a contract already made out, showing them how they could own additional property. It was used at dinner parties and used on the fly-ins (Tr. 16448).

Horizon headquarters was directly involved in reload efforts during 1973 and 1974. In April 1973, Horizon mailed to customers the following announcement of a trade the company was offering:

We're selling single family lots in Horizon City, Arizona Sunsites and the Rio Communities at substantially higher prices than at the time of your purchase. *So, we'd like to make a trade with you.* Horizon Corporation will take your single-family lot in trade at its current appreciated price, and transfer your equity to commercial or apartment use property of equal **[98]**or greater value . . . (CX 721, 737; see also CX 95, 98).

The mailing to each customer showed the appreciation and other data applicable to the customer's account. For example, one witness's account showed appreciation of $1,155 and a trade-in value of $2,200 on a lot with an original sales price of $1,045 (CX 721; see also CX 737). Under this offer the customer would be allowed the appreciation, *i.e.,* the difference between the purchase price and Horizon's current selling price for similar lots. Respondent reinstated the trade-in offer in 1974 (CX 95C, 96A–G). It was stated that this program would enable customers "to take advantage of the price appreciation of their Single Family property" (CX 96C). The general practice, however, was not to give customers the appreciated value on their trade-ins (Tr. 3941, 4612–13). One customer witness, Melvin Bradley, received such a brochure and he thereafter purchased some multi-family property (Tr. 5162–68).

Sales representatives testified about their reloading efforts. One sales representative testified he would call customers when a price increase came through and tell them their property "is really going great guns". . . So, we would say, "that is what your land is worth," even though they could not sell it (Tr. 2162; see also Tr. 2314, 3528–29, 3726–28, 3744–45, 3942, 4363–65, 4515, 4566).

A sales representative and sales trainer, employed in Horizon's Denver office from October 1973 through December 1974, testified about his reloading efforts using Horizon's selling prices:

We get all the information from our sales books, our price books, and bring them up to date on what the price of their property would be if Horizon had it back at the time and was reselling it; in other words, if they paid $8-hundred for a lot, and it was up to $14-hundred, that's what people were interested in hearing. They wanted to know what we would resell the lot for, in other words, the price of the property, what is

happening to the community that they have got their property in, what's new since they have been out there. (Tr. 4363–64)

In making appointments for reloading sales efforts, the sales representatives stated that the purpose of the appointment was to update the customer on his property; they did not mention that an attempt would be made to sell additional property. Marc Knasel testified:

A. It seemed, my best recollection is when I trained them on how to call for that appointment I told them to simply tell the prospect that he had additional information on his property that we would like to see him about and could he have an appointment. I do not believe I trained them to say anything like, "I would like to come out and show you another piece of property." [99]O.K. wait, there are exceptions to that too. In some cases we did tell them that we wanted to sell them a piece of property. I recall now a Christmas offering that we had, December of '71 I believe, where we went to existing customers and there were some especially packaged and priced lots in Horizon City, I guess it was, and we told those people on the phone we had a piece of property we wanted to show them cold in the request for appointment. There may have been some other exceptions but they just do not come into mind (Tr. 3777–78).

Sales representatives testified that they advised the customer that the purpose of the visit was to update them on the property; the sale of additional land was not mentioned at the time the appointment was made (Tr. 2316, 4605, 4685, 6041).

Horizon's internal surveys of its sales offices revealed that reloading was extensively practiced in the sales offices; reloading was a prime source of business (Finding 68, see especially CX 927E, 929C, I, 936C, 937B, 938F, 939A, 950I, K). These surveys showed that customers were "traded" into multi-family property or into "better" locations on the representation that the holding period to profitability would be shorter, and the profit potential enhanced (CX 927E, F, H, 929D, F,I,J,K, 938D, 944E, I, 946H). The surveys also revealed instances where customers were traded from Whispering Ranch property into Tierra Grande property on the representation this was a special offer to Whispering Ranch customers to give those customers better property, since Whispering Ranch had been disappointing (CX 939A–B). The surveys also noted instances where customers were telephoned and appointments made to update the customers without revealing that the actual purpose of the appointment was to sell property (CX 947J).

Sales of Waterwood property were made on the basis that the customer must first purchase other property in order to "trade" into Waterwood (CX 932F, 946H, 950I).

Numerous customers who testified in this proceeding purchased

additional property after their original purchase through the reloading technique (Tr. 923–24, 931–32, 962–65, 1194–98, 1219–20, 1335–39, 1702–08, 4899–4904, 4938–43, 5032–33, 5035–36, 5162–68, 6219–21, 6080–82, 6406–09, 6482–84, 6213–15). All customers apparently received telephone calls or visits which can be attributed to "reloading" efforts by sales representatives (Tr. 1567–68, 1838–39, 4868, 6451–58, 6269–71). One customer testified that he was "harassed" by such telephone calls (Tr. 4937–38, 4949–50).

J. Use of Property Locations and Designation as Selling Tools

69. Horizon's sales representatives used the location of lots as sales tools. Some of the representations concerned "corner lots," lots on a "cul de sac," proximity to parks and schools, a "military highway," a University of Albuquerque Branch, a highway [100] loop, and proximity to the developed area. Sales representatives were trained to point out to prospective purchasers the locations of the particular lots being offered for sale (CX 161Z–2, 160Z–2, 778Z–10, 957E).

Melvin Weber purchased three lots together, one on a corner, and he was told schools were going in nearby (Tr. 1106). Later, Mr. Weber was reloaded with three residential lots which were represented to be closer in to the development area (Tr. 1119).

Carl Troyer purchased two Horizon City lots that were located near where a school would be located (Tr. 1329). He was later reloaded with two lots which were located closer to the developed area where roads would be built making lots accessible to El Paso, and the lots would develop faster than the other losts he had purchased (Tr. 1337, 1367). Patsy Zecco purchased an oversized corner lot which the sales representative stated was in demand over regular lots (Tr. 1620). Willard Morgan purchased two lots adjoining, one was a corner lot, in Rio del Oro (Tr. 1564). One sales representative, Julian Parodi, purchased a lot in Rio del Oro which he believed would develop soon because it was located near where a university was to be established. This sales representative also sold land to others based on the location of the university (Tr. 4428–33): "Everyone in the office talked about a university, including the general manager" (Tr. 4428). Training manuals instructed sales representatives to represent that there was to be a branch campus of the University of Albuquerque in Rio del Oro (CX 157M, 163J).

70. Other representations concerned multi-family, commercial, and acreage parcels. These representations were used to impute value to the particular lot or parcel being sold. Multi-family and

commercial lots were often utilized as upward trades for customers owning single family lots. Such property was sold initially to persons who appeared to have more available income than the usual customer. Trades to closer-in property was also used as one method of satisfying customer complaints.

CX 458, a brochure entitled "How to Multiply By Dividing," was used by Horizon in selling acreage. This brochure stresses the many possible uses that may be made out of an acreage parcel; *i. e.*, commercial, apartment or residential use. The brochure states that you buy at an acreage price and sell by the lot price (CX 458J). "Business-use land can produce exceptionally high profits" (CX 458BV; see also CX 459–60, 622). These brochures were in use at least from 1969 through 1973 (CX 312J–K; Tr. 4199, 6038, 6055–56, 6070), and by some sales representatives as late as 1974 (Tr. 1945, 16432–36).

Theodore Stone, employed by Horizon from 1968 until 1974 (Tr. 1904), was trained by Bill Cook, who later became Horizon's Vice President for Sales, on acreage sales to use an approach which Mr. Stone described as the "most powerful sales presentation that we had the bulk acreage because of the opportunity to buy in bulk and resell by lots" (Tr. 1939). "The acreage approach" involved the sales representative drawing a rectangle to represent an acreage parcel on a piece of paper, then dividing that rectangle between 16 and 36 "lots." To show the potential value if used as residential lots, the **[101]**sales representative multiplied the number of lots by the lot price on the FHA chart (Tr. 1939–40). By using the FHA lot amount of $2,901 per lot with the improvement costs removed (CX 195U), the residential potential ranged from about $46,000 with 16 lots to $104,000 if there were 36 lots. Sales representatives used an "acreage approach" which contained statements which were the same as or similar to those in CX 458–60, relating to the greater profitability of acreage parcels. These statements were made to demonstrate to a prospect how he could "multiply" his profits "by dividing" the acreage parcel into many lots (Tr. 16432–36, 6038–39, 1939–41).

Customers testified about the use of the acreage sales approach at the time they purchased Horizon acreage. John Mossman was advised by the sales representative that he could divide his 5-acre parcel in Whispering Ranch, for which he paid $4,000 into 20 quarter-acre lots, each worth $1,000 - "potentially a $20,000 property" (Tr. 4862). The sales representative advised Joan Wild that the 5-acre lot in Canyon del Rio which she purchased for $8,000 (RX 125) could be subdivided under existing protective covenants into one-half

acre lots which would be worth $10,000 per lot in a few years (Tr. 5035). Helen Anderson was advised that she could divide her 10-acre parcel in Whispering Ranch into one acre lots and thereby increase her investment profit (Tr. 6216–17).

Sales representatives were trained that multi-family land was 3–4 times more valuable than residential, industrial 6 times more valuable, and commercial 10 times more valuable than residential (Tr. 1935, 1940–41, 2125, 2325, 4772, 16325, 16378, 16433). Multi-family and commercial property were more expensive and sales of such property were reserved for customers with the financial ability to make larger monthly payments, or customers who had previously purchased Horizon land and had some equity to use in a trade. One sales representative testified:

So you have your choice of single family, multi-family or commercial. The only drawback is if a person had a limited amount of money, naturally, if he only had $10 a month, he would have to stick to single family, but if he would go to $25 a month, he could then afford multi-family and that is about, in most instances, high as they went to start with. You could tell them that after they had built up an equity, because on the contract, the Receipt of Deposit, it states that at any time prior to deeding, that they can trade their land for any other land that is available at that time (Tr. 2325; see also Tr. 2165, 2325).

Sales representative Milton Doyle testified that he would check out a customer's equity, figure out how much they could put into a new property, "and what we would do is usually trade them like for a single family up to a multi-family or sometimes commercial, or sometimes acreage" (Tr. 4634). Mr. Doyle explained the benefits which a customer would receive by trading property: **[102]**

They would stand to gain more having commercial or multi-family than having single family, that's the impression we gave the people (Tr. 4645).

Olin Hillman, a sales representative and district trainer, was taught, and he used, a sales closing showing the desirability of multi-family property:

It was a multi-family lot that had been theoretically set up into a fourplex. The people had the opportunity to buy the lot for $3,000, $300 down and $21 a month and based upon the average rents in and throughout the city of Denver which was something the folks could identify with, you were talking a monthly income somewhere in the neighborhood of $1,080 upon developed property and it was very strong.

Q. Did you subsequently use that closing method?

A. Yes.

Q. During what period of time?

A. Off and on the whole time I was with the company (Tr. 4668).

Other sales representatives explained to customers that they could build a four-flat building on a multi-family lot using the equity in the land to build the building, not taking any money out of their pocket (Tr. 5973–74, 6141–42, 6153).

Customers were reloaded or upgraded by sales of multi-family or commercial property. Col. John Yuill was reloaded with a commercial lot in Horizon City that he was told offered greater potential for appreciation (Tr. 831, 845). He also purchased a lot in Rio del Oro much closer to the development area than his previous lots which he was told appreciate in a shorter period of time (Tr. 839). Burnice Carter, a small businessman, purchased four residential lots and one commercial lot. He was advised that there was more profit to be made in the commercial lot (Tr. 912). Mr. Carter later bought commercial lots on two separate occasions, each time upon the representation that the lots had excellent locations. One would be a corner lot on a thoroughfare that would be cut through and the value would rise fast (Tr. 924, 932). Allen Nesbit was reloaded with a multi-family lot which he was told was more choice than residential lots (Tr. 1195).

Carmie Ottaviano was persuaded in 1973 by the Horizon sales representative to trade two acres which he had purchased from Horizon in 1961 for a multi-family lot in Rio del Oro. He was told by the sales representative that a six-unit flat could be placed on the lot. Mr. Ottaviano was told he could have a 99-year lease on the property with the developer and he could live there free. At the **[103]**end of 99 years, his grandchildren or great grandchildren would own the land (Tr. 6410–11, 6440–41). Mr. Ottaviano was told that the lot for which he paid $3,000 would be worth $17,000 at development in six to seven years (Tr. 6411–12, 6440–41).

Douglas Thornly traded Whispering Ranch property for three multi-family lots in Rio del Oro at $3,900 each. The sales representative advised Mr. Thornly that the property was in a much better area near a planned recreational center. Mr. Thornly was also told that he would need three lots for a 16 flat multi-family dwelling (Tr. 6483–84). The main part of the construction was going along the road where the lots were situated (Tr. 6486).

Howard Gottesman traded his single family lot for a multi-family lot that was a very, very good deal and would not be available beyond that evening. The sales representative explained a three-way setup whereby the developer would receive ⅓ of the rents, the manager ⅓ and Mr. Gottesman ⅓ (Tr. 16675–76).

Rio King purchased a second lot in Whispering Ranch upon the

representation that he would be one of only two owners of the only commercial lot in a residential section, and it could be used for a gasoline station or a convenience store (Tr. 1253).

John Gothard was reloaded with a multi-family lot for which he paid $10,800. The sales representative stated that a person should upgrade his property all the time. The sales representative spoke of commercial purposes like hotels, cinemas, plazas and high rises where you could derive income from buildings (Tr. 6082–83). The sales representative made it plain that multi-family property was more valuable than single family property (Tr. 6088).

David Krausse purchased a multi-family lot which was represented to be a better investment than single family property (Tr. 1692–93). Mr. Krausse later was given a sales presentation as a "preferred customer" on some investment property close to the development area that could be expected to mature in a short time. He purchased multi-family lots at this time (Tr. 1704–07), which were represented to be corner lots near a highway loop (Tr. 1744).

Roland Nokes traded his five lots in Rio del Oro for one commercial lot and two residential lots. The sales representative in this successful reload effort stated that commercial property was the "Cadillac" of real estate because of the limited supply available and it was preferable to multi-family property. The commercial lot was located really close to the center of development (Tr. 4900–01, 4904).

Often these tactics of desirable location, commercial or multi-family lots and acreage parcels were used in combination to reload customers. Ivan Wescoatt was reloaded by trading his two single family lots for two multi-family lots adjacent to where a university branch was to be built. The multi-family lots could be used for dorms for students and faculty. A new military highway was to be built which would connect the property to Albuquerque. The lots were represented to have the greatest appreciation of any Rio [104]del Oro lots because of the location of the university (Tr. 4939–43).

Joan Wild purchased what was represented to be the last lot in a shopping center which Horizon was going to develop, and two lots together, one on a corner, right on the loop of a major highway which was to be built through the Isleta Indian Reservation. The two lots were represented to be desirable for a gasoline station location (Tr. 5024–30, 5069). Mrs. Wild later brought two residential lots, a corner lot and the adjoining lot, close in to a development area where Horizon was developing at that time (Tr. 5032–33). About one year later, a different Horizon sales representative sold Mrs. Wild a 5-acre tract of land in Canyon del Rio, which could be subdivided, near a satellite development which Horizon was going to start (Tr. 5035).

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In response to a brochure mailed from Horizon headquarters, Melvin Bradley traded three Arizona Sunsite lots for one multi-family lot in Rio del Oro. The lot was represented to be near where a major highway would be built. The sales representative recommended the specific lot because of its location near the highway. He also recommended that Mr. Bradley retain the land but transfer the surface for buildings which could be rented (Tr. 5163–65). Helen Anderson purchased two 5-acre lots in Whispering Ranch. The sales representative stated that both lots were on a section line and would have greater value than the other property because it would be commercial (Tr. 6184, 6191).

Horizon's internal surveys of its sales offices reveal extensive reloading of customers based on respresentations by the sales representatives that (i) multi-family property will be a more profitable investment, and (ii) a change of location which will develop in a shorter time period (see Findings 89–100, *especially* CX 927, 929, 938, 939, 951).

K. Use of Horizon's Price Increases

71. Horizon's sales representatives used Horizon's price increases on its lots as sales aids. Theodore Stone, who was a Horizon Zone Manager for several years, testified that price increases were used as sales aids to sell more property and to reload (Tr. 2002, 3527). He also testified tht Bill Cook, Horizon's Vice President for Sales, would send telegrams to the various offices forecasting price increases which were used to close sales:

Q. In what manner were they used to close sales?

A. Create the urgency.

Q. Was there ever any change in this method of closing sales during your tenure with Horizon?

A. No, sir. (Tr. 2003) **[105]**

Sales representatives testified about using past Horizon price increases and future price increases in their sales efforts (Tr. 2162, 3776–77, 4363–64, 4515, 4684–85, 4730–34, 6041, 6045–46). One sales representative testified that he used past price increases by Horizon to show "how much the lot is going up in value" (Tr. 1867). "[W]here there was price rises from the time they had purchased, which in most cases there were, we would show them that they were starting to make money with Horizon" (Tr. 6041). Horizon's price increases

were also used to encourage the customer to ". . . take advantage of the present price before the price increase took effect" (Tr. 3527).

According to the testimoney of one sales representative, at the end of 1974, a price increase of 20 percent was announced. A sales meeting was called and the sales representatives were told it would be a good sales aid to sell property just before the price increase. This sales representative sold property using that presentation, but to his knowledge the price increase never occurred (Tr. 3527, 3547). A Pinkerton's Inc. shopper's report on this sales representative confirmed this testimony (CX 953A).

Customers testified that sales representatives used past and future Horizon price increases in their sales presentations. Burnice Carter was told he could show an immediate profit of $150 per lot by purchasing at that time because the price of the lots was going up the next day (Tr. 893–94, 913; see also Tr. 6088). Michael D. Collum was told there was to be a price increase right away so he should buy now (Tr. 1528–29). Carl Troyer was told that prices on the lots he purchased were going to be increased so he had to act fast to take advantage of the prices being offered (Tr. 1326). Jose Medina purchased two lots at a price which was represented to be below the normal price of the lots (Tr. 4994, 5006). Austin Anderson was told that the property he purchased was $100 more this month than the previous month (Tr. 16266, 16281). Col. John Yuill was told he must act quickly or the lots might not be available and would be more expensive as a price increase was anticipated within the next few days (Tr. 826, 874). Larry Cervenka was told that the lots presented to him might not be available at a later date and that the price on the lots was going up within two months (Tr. 1825). James Devlin was told that the lots he purchased were going up in price within a week or two (Tr. 16625, 16655).

Price increases which Horizon effected on its lots were used extensively in reloading and were a basic part of the sales effort to existing customers (Finding 68).

L. Immediate Purchase Pressure

72. Representations were made to customers by Horizon sales representatives that the customers had to act fast, or at the time of the sales presentation, in order to purchase before price increases took effect (Finding 71). There is other evidence of pressure on customers to purchase immediately.

Training manuals instructed sales representatives of methods whereby a sense of urgency could be created. CX 180, a sales [106]

training manual for the Southeastern Zone, had the following statement:

> Many times you can use the TBA system [system of allocating property to sales office and sales representatives] to help you create the image of a limited supply of a particular type of property. This can be done by making your phone calls and discussing your limited allocations so that your client may hear you (CX 180Z27).

This training manual instructed sales representatives how to use the telephone in an "Assumption Close": "So instead of asking if he wants to buy, you say: 'may I use your phone for a minute? I want to call the office to make sure they will reserve this property in your name'" (CX 180Z010). Another technique advised by this training manual was "the Impending Event Close." The sales representatives were instructed to stimulate sales with impending events such as: (1) future price increases; (2) last remaining lots in an area; (3) lots are being sold on a first-come first-serve basis, and will not last long since all area sales representatives are selling this property; and (4) if you don't take this property tonight, I can assure you it will be sold tomorrow (CX 180Z12).

CX 957D, a training manual used in Horizon's Philadelphia office, suggested the following statement:

> Before I came to your home tonight I got a special allocation direct from our Inventory Control Office. You see, the cardinal sin of the land business is to cause two people to invest in the same property. To prevent that, Inventory Control gives me a 24 hour hold on this choice piece of property and we can be reasonably sure that no one, in any one of our hundreds of offices is discussing this piece of land with any one in this country. Of course, tomorrow it will be returned to inventory if you cannot see the wisdom of freezing it in your name, this evening. To my knowledge, there has not been a price increase in over 10 months. Usually, price increases occur once or twice a year so that, it don't happen every day but, when it does, it occurs overnight! (CX 957D).

Dinner party speakers made representations about the necessity for immediate purchase of Horizon land. A tape of a dinner party speech used in the Denver office had this statement:

> Now this evening we're conducting investment seminars all over the United States. 63 major cities and in order to [107]control the investment properties that we're going to be discussing with you tonight in Rio del Oro we have in our home office in Tucson, Arizona an IBM 360 computer which allocates to the various offices across the country the investment properties which are available. Now this evening each representative does have an envelope with this evening's allocations. Due to the mere fact that Rio del Oro is just about invested in our allocations are limited for this evening. Therefore, representatives, in the event that the two families are interested in regards to the same option of property which is available it will be on a first come first served basis (CX 601, p. 16).

Another dinner party speech had similar language:

[I]n order for your representative to talk with you of a specific property, our home office in Tucson, Ariz. allocates to each seminar specific properties that are available for tonight and tonight only. This is so that right here in Denver, Colo. that your representative will not be discussing the same opportunity as another representative will be discussing in another part of the country. The investment properties are for Denver and Denver alone. Each representative has an envelope and shortly I will be asking him what allocation he is discussing with you (CX 858H).

At the conclusion of the main dinner party speech, each sales representative was instructed to open the envelope and select an option for the party at the sales representative's table. When called upon by the dinner party speaker, the sales representative was to state "Mr. Speaker, I want the primary on option No. _____ " (CX 859A). Thereafter, when a verbal commitment to purchase was made, the sales representative stated "Mr. Speaker, option _____ has been confirmed" (CX 859B). The speaker acknowledged confirmation and congratulated the prospects by name (CX 859B; see also Tr. 16473–74, 4946). A description of such a dinner party operation was given by one customer witness:

[H]ere again it was the same type of presentation that there were only a few left and if you want them, you had better get them.

* * * * * * *

When the actual sales started, well, every so often the gentlemen in front would [108]say: Another sale has just been made, in a loud voice, property so and so (Tr. 4946).

[B]ut it was a carnival like atmosphere with a barker up there saying: Lot so and so being sold. There wasn't a great deal of yelling because there wasn't that many salesmen (Tr. 4966).

Sales representatives testified about techniques they used to create a sense of urgency. Theodore Stone, a Zone Manager while with Horizon, testified about prospects who objected and wanted to delay making a purchase:

Well, in procrastination we were supposed to use the telephone as a close tool to create urgency by phoning Tucson, Arizona on their WATS line to see if we couldn't close it while we were on that WATS line.

* * * * * * *

Well, there was an outgoing WATS in Tucson, Arizona and we would call, and we would be told the lines were busy, and then we would leave a name and phone number, and they would call us back on the telephone. Then, we would go through some conversation on the telephone and hold it in our hand waiting for the customer to make up their mind as to whether they were going to buy that night or not.

* * * * * * *

JUDGE BARNES: Was it necessary to make this call before you could make a sale?

THE WITNESS: No sir. (Tr. 1937–38; see also Tr. 2080–84).

Carl Bishop, who worked for Horizon as a sales representative from August 1970 until December 1971 and was a sales manager for Horizon for over one year, testified how he used a "phone close":

I'm talking to you and I have the map laid out in front of the people and everything is ready to sign and I get on the phone and I say, "Mr. Jones, this is Carl Bishop. I am in the home of Frank Smith. Mr. and Mrs. Smith are interested in Lot such and such, and such and such. Oh, there is!

You have somebody on the other line that is interested in that piece of property right now? [109]

Then I turn to my customer and say, "Do you want that? If so, we have to make the decision right now," and they would respond (Tr. 1878–79).

At times, Mr. Bishop testified, there would be no one on the other end of the line: "We close the deal. After all, we were commissioned salesmen. The only way we got money was to close deals" (Tr. 1879).

Ralph Symalla, who was a sales representative for a short period (Tr. 4743), described a mock reloading sales presentation presented by his sales manager and attended by several other persons. After the sales representative arrived at the customer's home to update the customer on his property, and had announced that there was no property available, a preplanned telephone call would come in for the sales representative informing him that a deal had just fallen through on some commercial property and it had become available but would probably not be available for more than an hour. If the customer wanted the land he would have to make up his mind in a hurry. Also preplanned was the exact property which would be offered to the customer based on what the customer had previously purchased and what he could afford to buy (Tr. 4744–46, 4749–50). This technique was stated to be very successful (Tr. 4746).

Customers testified about the immediate purchase pressure used by sales representatives. Col. John Yuill testified that on the evening he made his first purchase the sales representative made a telephone call and then represented that the lots under consideration were available but they were the only ones left in the tract and they were expecting an increase in price within the next few days (Tr. 825–26).

Burnice Carter was told that the lots he purchased were going up in price the next day (Tr. 893–94, 911). About one month later this

same sales representative stated that he had a 24-hour exclusive on a commercial lot that would be a good investment and Mr. Carter would have to act that night to get the lot (Tr. 923–24). Two or three months later this sales representative again represented that he had another 24-hour exclusive on a lot that would be a real good investment (Tr. 931, 958).

The Oliver brothers, J.D. and A.O. Oliver, testified that they were told that the lots they purchased had been taken off public sale and this would be their last opportunity to buy a golf course lot for $6,000 (Tr. 980–81, 1031–32, 1040, 1052).

Melvin Weber testified that the sales representative had to use the telephone to check and see if the three lots which he purchased that night were still available, since the lots were going real fast (Tr.1119, 1143–44).

James Madget was told by a Horizon sales representative that persons already owning Horizon property would be eligible for a pre-[110]public sale of Waterwood property and that he could trade his purchase in on Waterwood property. The purported deadline for this pre-public sale and trade into Waterwood property was September 15, 1972. Mr. Madget made a purchase of three lots in Horizon City on September 2, 1972, approximately two weeks prior to the "deadline" (Tr. 1392–94, 1426, 1428; RX 41, 42).

David Krausse, who already had purchased Horizon land, was contacted by another Horizon sales representative and given first access to investment property because he was a "preferred" customer (Tr. 1704). Mr. Krausse was also told that if he did not purchase the property that night it would be gone in a very short time (Tr. 1708). Mr. Krausse later sought a refund from Horizon on this purchase, and the Horizon sales representative told him that an additional purchase would probably expedite the refund (Tr. 1712). Again, Mr. Krausse was told the purchase would have to be consummated that night, otherwise the property would not be available (Tr. 1715–16).

Larry Cervenka was told that the Horizon sales representative had only two lots available, one a corner lot, and that the prices would be going up so that there was no guarantee the lots would be available at a later date and at the same price (Tr. 1825).

Joan Wild purchased what was represented to be the last commercial lot in a Rio del Oro shopping center that was to be built immediately (Tr. 5027–28, 5049). About four months later, the same sales representative represented to Mrs. Wild that he had two especially good residential lots that he had been given to sell that

night; otherwise, the lots would go back to Tucson and be given to someone else (Tr. 5032).

John Gothard was told by the Horizon sales representative that he had better sign that night because there would be no more such land available. The sales representative also stated that there was about to be a price increase on the property (Tr. 6088, 6117).

Margaret Hayner was told that a "hot property" the sales representative was offering her would not be available very long (Tr. 6220, 6227). Frank Simon was told that the allocation of lots for sale in the Boston area was limited and he should act fast before the lots were sold by some other sales representative (Tr. 6252). Robert Pernini was told there were only three or four of the lots left and this would be the only way he could get into the particular development (Tr. 6293). Carmie Ottaviano was told that he was a preferred customer since he was a previous purchaser of Horizon land. The sales representative made a telephone call to see if the particular corner lot he was offering Mr. Ottaviano was available and he took a post-dated check in the purchase transaction since Mr. Ottaviano did not have any funds immediately available (Tr. 6415).

Douglas Thornly was told by the sales representative that he only had a few Whispering Ranch lots to sell and they were going fast (Tr. 6481). He was later visited by another Horizon sales representative who presented lots in a new area just opened up by Horizon with only a few lots left and to be one of the lucky ones Mr. Thornly had to invest right away (Tr. 6482). Nancy Tweedy was [111]told by the sales representative that there was only so much land available and when it's gone, there's no more, so you must buy now. She was also told, after the sales representative made a telephone call that there was only one lot available, and that lot had been purchased back by Horizon from a divorced couple (Tr. 6545–46; see also Tr. 16209).

Elsie Colon was offered multi-family property at the time she made a property visit. The sales representative told her that this very important land could be offered to her only because of her property visit, that it was being offered at a much cheaper rate because of the property visit, and that the property could not be offered to her after the visit was over (Tr. 16216, 16220–21). The sales representative who sold James Devlin four lots in Rio del Oro telephoned "the director or his boss" and made certain the lots were available so that Mr. Devlin could purchase them right away because they were going up in price a week or two later (Tr. 16625, 16655).

Grace Swanson purchased four lots in Rio del Oro. She testified:

Mr. Weiss had made a phone call to see if the property that we were interested in was available. When he got off the phone, he told us that we would have to have a decision

within an hour, at the most, because other people were also interested in that particular property. We were sitting there and discussing it and he was showing us more brochures. We saw the film.

When it came down to the fact that, yes, we were really interested, he said, well, let me call and make sure the property is yours. While I am on the phone, sign here, sign here and initial here. That's how we signed it (Tr. 16158).

Horizon sent out mailings in 1973 and 1974 offering to accept trades of single family property located in Horizon City, Arizona Sunsites or Rio Communities for multi-family or commercial property. The trade-in value would be the current Horizon selling price, which would probably represent an appreciation over the original purchase price. Horizon put a deadline by which these trade offers would expire. The April 1973 offer expired May 31, 1973 and the January 1974 offer expired May 31, 1974 (CX 95C, 96, 98, 99, 721, 737).

Horizon's internal surveys of its sales offices revealed instances where sales representatives stated that the property would be available for only one night, or that a special price was being offered, or that special inventory was being offered, or that the price on the property being offered would go up the next day (CX 929J, 941B, D, 950E, F, 953A). **[112]**

M. Locked-In Growth

(1) *Locked-In Growth of Albuquerque*

73. A significant representation which permeated almost every sales presentation of property in Rio Communities was the portrayal of Albuquerque as one of the fastest growing cities in the United States, and the anticipation that this growth would continue in the future and thus favorably impact on land values in Rio Communities. Training manuals, presentation manuals, dinner party speeches, newspaper advertisements (CX 503D), brochures and films all carried this message. Respondent's sales representatives and documents cited various projections of the future population total of Albuquerque; for example, they projected a population of almost one million people in the year 2000 (CX 161T), and of an increase of 600,000 people by approximately the year 2000 (CX 162Z, Z–14, 615A, Z23).

The growth of Albuquerque and its favorable impact on land values in Rio Communities was further emphasized by what was represented to be the "locked-in growth" of Albuquerque. "Locked-in growth," as explained by Horizon documents and sales representa-

tives, meant that all of Albuquerque's future growth would be south toward Rio Communities because of physical and land ownership barriers which prevented Albuquerque from growing in other directions—"only one gate" in "the fence" around Albuquerque, which was in the "growth corridor" south to Rio Communities (CX 858F, 957D, 601, pp. 8–14). Sales representatives told prospects that Albuquerque was one of only three cities in North America that could "grow in one direction and one direction only" (CX 858G; see also CX 601, p. 8, 11).

CX 160, a training manual used in the Southwest Zone from May 1970 until February 1972, described Albuquerque as a city that has walls surrounding it so that "the city can only grow in one direction" and "this is like having an unrestricted city with a 452% rate of growth and this is really fabulous" (CX 160X). This training manual described Albuquerque as having already built up to the edge of the Sandia mountains to the east. To the south the Sandia Military Reservation and the Isleta Indian Reservation fence off further growth. To the west is the Atrisco Land Grant which is community property held by hundreds of people that has been tied up in the courts for decades. A corporation has recently been formed which can lease the property but not sell it. To the north is another wall - an Indian reservation and two land grants, the Gallegos and Alameda Land Grants. Albuquerque is described as a dynamic, pulsating city with a wall surrounding it on all four sides, bursting at the seams, with more and more people arriving each and every day. A freeway was built to the south to relieve the pressure and it leads to Rio del Oro, a completely preplanned community. - "Doesn't this look like a money making situation" (CX 160X, Y, Z1).

CX 778, a training manual dated March 1970 had instructions on locked-in growth—"Let me show you a city with a fence around it." This training manual also stated: "If you had a piece of land right here—in the only direction this city could expand—right in the path of the stampede—would you feel you had a pretty good investment" (CX 778Z52). **[113]**

CX 778Z10, a Horizon district office bulletin dated March 28, 1970, instructed sales representatives to sell the city—"locked in growth pattern, growth rate four times larger than the national average."

CX 157, a training manual used in 1974, had a read-off for the sales representatives which stated that "Albuquerque is one of the fastest growing areas in the United States today," "Albuquerque is booming with industry"; "Albuquerque is the nuclear research capital of the world"; "there are more Ph.D's per capita in Albuquerque than anywhere in the world" (CX 157K). This training

manual anticipated a population of 900,000 people by the year 2000 (CX 157L). The training manual also discussed the restrictions on the growth of Albuquerque by physical and land ownership barriers (CX 157L). Other training manuals having similar locked-in growth presentations are CX 161T, U, 163J, O, 180Z16–Z18, 615Z14–Z15, Z22–25, 905H, I, 957D.

Dinner party speeches referred to the locked-in growth of Albuquerque "Let's take a community with a fence completely around it" (CX 601, p. 11; see also Tr. 4770). Films also contained statements about the past and future growth, industrial expansion and residential development of Albuquerque (CX 526F–K, 527G–M).

TBA maps used in sales presentations depict the physical barriers to Albuquerque which sales representatives described to prospects (CX 203–15). Albuquerque's growth would "leapfrog" over the Isleta Indian Reservation (Tr. 4625), which sales representatives demonstrated by folding the TBA map to cover the Reservation revealing that Albuquerque was only 3½ "building miles" from Rio Communities (Tr. 4735; see also Tr. 5053–54).

Although property in Paradise Hills was substantially sold out by 1971 (Tr. 2012, 2168), there is record evidence that the locked-in growth of Albuquerque was used as a selling concept with respect to the Paradise Hills property. Rio Communities is located south of Albuquerque and Paradise Hills is located northwest of Albuquerque, yet, Horizon sales representatives stated that Albuquerque could grow only towards Rio Communities when selling that property, and only towards Paradise Hills when selling that property. CX 777, a TBA map dated 12/1969, depicts Paradise Hills and the physical barriers to the development of Albuquerque.

Barbara Kelly testified that she used the locked-in growth concept for all Horizon properties except Arizona Sunsites and Whispering Ranch; this sales representative did not sell Waterwood property (Tr. 16430, 16506). Clarence Langerud, a sales representative and sales trainer, who received a visit from one Horizon sales representative prior to the time he became a sales representative, testified that the sales representative gave a presentation based on the locked-in growth of Albuquerque towards Paradise Hills (Tr.2113–14). Mr.Langerud later became a sales representative and he used the locked-in growth of Albuquerque in sales presentations about Paradise Hills (Tr. 2126, 2169). Olin Hillman, a sales representative, sales manager and sales trainer, used the locked-in growth concept in sales of Paradise Hills property [114]"to some extent" (Tr. 4687). He testified that Paradise Hills was almost sold out when he became a sales representative and the proximity of the property to the

Albuquerque city limits was the stronger sales approach (Tr. 4733–35; see also Tr. 2011–12).

Sales representatives testified that they were trained on the locked-in growth presentation and that they utilized such presentations in their sales efforts (Tr. 2126, 2169, 2185, 2308, 4388, 4512, 4567, 4591–93, 4608–09, 4625–27, 4687–88, 4733–35, 4770, 5966–67, 6144–45, 6154, 16429–30, 16501–512; CX 955B). Milton Doyle, a sales representative and sales trainer employed by Horizon from July 1973 through August 1974, described his locked-in growth presentation as follows:

> Mr. Smith, here we have the city of Albuquerque. To the north of it, we have the San Felipe Indian Reservation, of course, you know the Indian Reservation is government land, and cannot be developed. Consequently, the city of Albuquerque cannot grow much further in a northerly direction.
>
> To the east here, we have the Sandia and Manzano Mountain range, so consequently, the city cannot grow much further eastwards.
>
> To the west, we have the Atrisco Land Grant, it is volcanic soil where it is hard to build, so consequently, the city of Albuquerque cannot grow much further in that direction, and that leaves one basic direction to go, ***.
>
> What I did then after I pointed out that the city couldn't grow too much to the east and couldn't grow too much to the north and couldn't go very much further west, what Albuquerque is going to have to do is more or less leap-frog the Isleta Indian Reservation toward the south or Belen. *** So, the next opening or opportunity for the city to go was south toward Belen or Rio Communities, and that's how I usually presented it along those lines. (Tr. 4625–27).

Customers confirmed that locked-in growth representations were made to them at the time they purchased land in Rio Communities (Tr. 820, 4898–99, 4931–32, 4935–46, 4971, 5030, 5053–54, 5163–64, 5172, 6086–87, 6125–30, 5412–13). One customer described the locked-in growth sales presentation:

* * * * * * *

> A. He described Albuquerque as a growing, thriving, bustling metropolis in the southwest. He pointed out to me, had a [115]map which I still have in my possession, a very nice colorful map showing Albuquerque, and its environs—and was showing me on this map how the area in which I was buying the property that I just described had to have a growth, they were certainly going to have a boom.
>
> He pointed out to me—and I don't want to say that the desert was on the west and the mountains were on the east and what was to the north. But suffice it to say that Belen was locked in to Albuquerque so that if Albuquerque grows the Albuquerque area and its environs, the population must come down south from Albuquerque to the Belen area, the area in which I just recently in these proceedings described my property.

The desert, the mountains, et cetera, were described as why the community I was buying land in had a locked in growth, if I may quote his words (Tr. 6086–87).

(2) *Albuquerque's Future Growth Is Not Locked In*

74. Albuquerque is bounded on the east by the Sandia Mountains and Cibola National Forest, to the south is the Kirkland Air Force Base and the Isleta Indian Reservation, to the north is the San Felipe Indian Reservation, the Sandia Indian Reservation and the Gallegos and Alameda Land Grants, and to the west is the Atrisco Land Grant; (CX 503; 203–15, 160, 161U, 157I, 615Z–24). Nevertheless, there is a very substantial land supply surrounding Albuquerque in several directions which can be developed.

George Carruthers was the City Planning Director for Albuquerque at the time of his testimony in June 1977; he had held that position since October 1974 (Tr. 3022–23). Prior to becoming City Planning Director, Mr. Carruthers occupied other positions in the Albuquerque Planning Department for a period of 17 years (Tr.3022–23). Mr. Carruthers stated that the Planning Department had written and distributed to the public since 1962 various reports analyzing existing and projected land use, population and other factors in Albuquerque and its environs (Tr. 3026, 3032–34; CX 827–31).

The first comprehensive periodic plan in the Albuquerque area was published by the Planning Department in 1962 (Tr. 3023–24, 3027). It was entitled the "AMA X-Ray and Prognosis Report" and provided a land use analysis for 1962, along with predictions and projections up to 1970 for the Albuquerque Metropolitan Area ("AMA"). A copy of the report is in evidence as CX 827, as is the land use plan for 1980 which was part of it (CX 828B–D). The AMA included most of the developed area within Bernalillo County, which constituted the Albuquerque Standard Metropolitan Statistical Area ("SMSA") at the time of the study (CX 827, pp. 3–4; 827B–D). At the time of the [116]report in 1962, 255,319 people, or 97.4% of the SMSA population, lived in the AMA (CX 827, p.104). The AMA Report contained three population projection series which are as follows:

	1970		1980	
Series	Bernalillo	AMA	Bernalillo	AMA
I	336,400	322,944	433,900	412,205
II	388,100	372,576	567,500	539,125
III	437,600	420,096	664,400	631,100

(CX 827, p.104)

The middle range, Series II, is considered the most likely population projection (CX 827, p.104). The likelihood of Series II led to a comment in the Report that "every effort should be made to encourage development within or at most, adjacent to the presently developed area" (CX 827, p.104; Tr. 3029–30). All of the population increases, regardless of the series, were projected to occur within the Bernalillo County SMSA for Albuquerque. The Report projected that the AMA would have 96% of the projected 1970 population and 95% of the projected 1980 population for Bernalillo County (CX 827, p. 104).

Regarding the supply of vacant and buildable land, the AMA Report concluded that there would be a "more than adequate supply of buildable land in the near vicinity of the presently developed area," regardless of which population projection was used (CX 827, pp. 15, 107–08). Moreover, the area within and near the AMA included 124,581 acres of vacant land rated as "buildable" apparently without considering other buildable land within the larger county area (CX 827, pp. 3, 107–08; 827B–D). The county itself contained 334,944 acres of privately owned land in 1962, of which less than 30,000 acres had been developed at that time (CX 827, pp. 30, 32).

The Planning Department's next major comprehensive plan was its 1985 Plan, published in February 1964 (Tr. 3032–33). It contained the same types of data as the prior plan, adjusted for the additional 5 years to 1985 to fit the larger "Albuquerque Transportation Study Area" ("ATSA") (Tr. 3033–34; CX 838D). The ASTA extended to the north into Sandoval County, past the town of Corrales (CX 828Z–55). Using the highest projections of future population, virtually all of Albuquerque's growth to 1985 was projected to occur within the ATSA. More specifically, the study concluded that Albuquerque should plan for a 1985 population of 830,000 with 825,000 of them within the Study Area (CX 828G). While the city used the highest figures to plan for public facilities, the middle series projection of 685,000 population was more reasonable and useful for detailed economic studies (Tr. 3035; CX 828L). As the report points out, the number of developed acres would rise from 29,914 in 1962 to 91,815 in 1985, leaving 114,471 acres vacant in 1985 out of the ATSA total of 212,608 acres (CX 828Z–2). This 1985 land use plan also has the following conclusions:

There are large areas of vacant land in every quadrant of the city, with most of it potentially developable for urban use. There is sufficient developable vacant [117]land within the study area to accommodate a population of more than 2,000,000. In addition, the Indian reservations to the north and south of Albuquerque and the mesa

to the west of the study area are potentially available for urban-type development contiguous to the present urban area and within reasonable driving time (CX 828Z–3).

Albuquerque has some 6,733 acres zoned for commercial use within the study area, but only 1,764 acres are being so used (CX 828Z–6).

. . . there are 14,892 acres zoned for industrial purposes, but only 2,351 acres actually are being so used (CX 828Z–8).

Albuquerque has an abundance of vacant land available for urban development. Even the most optimistic growth projections would not utilize this land within the current century (CX 828Z–11; see also Tr. 3036).

This 1985 Land Use plan states that the major growth of Albuquerque is occurring in areas north and west of the city, not to the south as represented by Horizon:

The Northeast and Southeast Heights will continue to develop with the closer-in areas reaching practical capacities. The Elena Gallegos Grant (north of Albuquerque) will expand the Heights residential areas. The West Side, including the South Valley, will start to develop extensively. Because of the lack of present development, the West side can be expected to become the fastest growing area of the city on a percentage basis, although the Northeast Heights will continue to have the most absolute growth (CX 828G).

The Middle Rio Grande Council of Governments ("COG") is an association of local governments, including special purpose units such as school and flood control authorities, in the four counties around Albuquerque, namely Bernalillo, Sandoval, Torrence and Valencia (Tr. 3074–75). Neither Paradise Hills nor Rio Communities is an associate member of COG (Tr. 3076). COG engages in an area-wide comprehensive and continuous planning process which seeks to guide local officials in the development of utilities and transportation systems (Tr. 3076–80). COG documents, including reports, are periodically published and made available to the public (Tr. 3080–81). [118]

COG published a report in 1972 entitled "1995 Development Patterns," which made projections up to the year 1995 (CX 836). This report was based on a downward revision of projected population to a figure of 580,000 by 1985 and an anticipated population of 762,100 by 1995 (CX 836, p. 9, 11–12). Albert Pierce was the Executive Director of COG when he testified in 1977, and he had occupied that position for five years (Tr. 3074). Mr. Pierce testified that COG modified population forecasts downward in the period beginning in 1967 to 1968 because two major employers in Albuquerque had reduced the numbers of their employees and this had an adverse economic impact (Tr. 3103–08). This report also indicated that the majority of growth in the Albuquerque area was still expected to be on land

within or in close proximity to the city (CX 836, pp. 13–15). The projected density maps which are part of this report, indicate there will still be substantial vacant land in or near the Albuquerque area in 1995.

This 1995 study by COG projected that the majority of development will continue to occur in the Northeast quadrant of the area until capacity is approached; development of the West Mesa will increase most significantly after 1980 (CX 836, p. 11). Mr. Pierce stated that this report assumed that the Northeast Heights of Albuquerque would continue to develop, as it had during the preceding 20 years, as the area where the majority of development would occur (Tr. 3117). Mr. Pierce testified that there were several square miles of vacant land in the Northeast quadrant (Tr. 3122–24).

Mr. Pierce also testified about growth projections within what he referred to as "Area Planning Jurisdiction-1" ("APJ–1"), which he defined as an area which went north of Albuquerque into Sandoval County, south into Valencia County, and with eastern and western boundaries he also described (Tr. 3082–87). This is the area in which urbanization may be expected within the next 20 years (Tr. 3982). He stated that this total area contained an estimated 13 range townships from north to south, about 4 from east to west, that each range township contains 36 sections of 640 acres each (Tr. 3087). These figures result in a total of 1,198,080 acres. Within the area defined as APJ–1, Mr. Pierce stated that there is "no shortage of land in any category" within the city of Albuquerque or outside the city within APJ–1 (Tr. 3166, 3139–42). As to industrial land, Mr. Carruthers confirmed that as of the time of his testimony in 1977 there was a great deal of such land, an amount "far in excess" of Albuquerque's "projected needs for the next twenty years" (Tr. 3060–61; see also Tr. 2982–85, 2999). Mr. D. A. Lomax, an expert witness who testified for Horizon, placed the usable land acreage in the Rio Grande Valley at 900,000 acres (Tr. 15166).

The majority of Albuquerque's growth as of 1967 was occurring in the Northeast Heights, in accordance with the 1985 Plan projections (Tr. 3046, 3049–59). That area continued to be the major growth area up to 1977 (Tr. 3046, 3049–50; 3117). The 1972 COG Report, CX 836, indicated that the northeast area would continue as the area with the majority of development during the period covered up to 1995 (Tr. 3117; CX 836, pp. 13–15; Tr. 3043–44). The northwest quadrant was predicted in both the 1964 and 1972 reports to have the second greatest amount of growth (CX 828G, 836, p. 11). The 1972 Report [119]predicted that development in that area would increase most significantly after 1980 (CX 836, p. 11). Lands available for develop-

ment in the "West Mesa" area include the property within the Atrisco Land Grant, an area of about 50,000 acres (Tr. 3133–39, 10853). The 1975 Planning Department Plan showed expected development and potential urban development in both the Atrisco Grant and the Pajarito Grant immediately to the south of it (CX 829, p. 2). Land within the Atrisco Grant area had at one point apparently been difficult to assemble in parcels large enough to develop. In the late 1960's, the Westland Corporation was formed to solve this problem. People who formerly had interests in that area exchanged their interests in the land for shares of stock in the corporation. This measure eliminated title and boundary problems within the area of the properties held by Westland (Tr. 3132–33). Mr. Pierce stated that all of this land is developable, and that it is and will be developing (Tr. 3135–36).

Other significant areas in the West Mesa and northwest quadrant where development is occurring and expected to occur in the future include the Taylor Ranch, parts of the city of Albuquerque, many subdivisions west of the Rio Grande River, Rio Rancho Estates and Paradise Hills (Tr. 3131–39, 10913–14, 10943–44). Rio Rancho has about 91,000 acres and 100,000 lots (Tr. 15373). As of 1977, it contained about 2000 houses and about 7000 residents (Tr. 3153). Paradise Hills contains 12,000 acres, only 1000–1500 acres of which had been developed as of June 1978 (Tr. 14024–25). Mr. Jack Stagner, a builder called as a witness by Horizon, indicated that there was a practically unlimited supply of vacant, undeveloped land in the northwest quadrant in some of these subdivisions (Tr. 10943–45). There has been growth north from Albuquerque to such areas as the town of Bernalillo and the Cochiti Dam development on Indian land (Tr. 19878, 10897, 15365–66; CX 835). East of the Sandia and Manzano Mountains, there is land available for development because of the economic interdependence between the people living in those areas and Albuquerque. These areas include Cedar Crest, San Antonio, Tijeras, Sandia Park, Sedillo, Edgewood and Chilili, the last two of which are more than 20 miles from the easternmost border of Albuquerque (Tr. 15327–28; CX 835).

Evidence of growth and development within the city of Albuquerque, so-called "infill," comes from a 1972 "Vacant Land Study" by the Albuquerque Planning Department. Even taking the City's annexations of additional land into account, the 1962 total of 20,059 vacant areas in 1962 declined to 14,035 usable, vacant acres in 1972 (CX 835, p. 5). More than 68% of the remaining vacant land within the 1972 boundaries was in the "East Mesa" areas of the city (CX 834, pp. 5, 9). The city has even annexed some land along the

northern edge of the northeast quadrant (Tr. 3045–46). Moreover, Mr. Carruthers testified in 1977 that there had been much activity within the developed parts of Albuquerque and throughout the entire city, especially in the Northeast Heights (Tr. 3044–46). The 1972 "Vacant Land Study," recommended various actions to encourage infill.Albuquerque did in fact take certain actions to encourage infill, as have certain other COG member jurisdictions. Albuquerque's measures of this type included assessing standby charges for utilities to lots with water and sewer service, with the owner of **[120]** a vacant lot paying for the charge even if the services weren't used (Tr. 3168–69). In the opinion of Mr. Pierce, this action has had a substantial effect in encouraging people to construct a home or other building on available lands within Albuquerque (Tr. 3169).

Additional land which Albuquerque could use, if needed, for urban development is in an 11,000 acre tract in the Southeast Mesa (Tr. 3062–63). This land has the Albuquerque Airport on the north, the Isleta Indian Reservation on the south, I–25 on the west and Kirkland Air Force Base on the east (Tr. 3061–62). Various constraints to its development have existed since at least 1971. In that year the New Mexico State Highway Department vetoed the idea of putting I–25 on the edge of that tract, redesigning Interstate 25 so that the Southeast Mesa does not have direct access to it. Limited highway access is expected by Mr. Carruthers to be a problem for about 25 years in the future (Tr. 3062–65).

Indian lands north and south of Albuquerque have potential for development and use. The Cochiti Indian land north of Albuquerque is being used for a development (Tr. 10878). Both the Sandia Indian Reservation north of Albuquerque and the Isleta Indian Reservation south of Albuquerque have master plans for development of their property by themselves and others. While they cannot sell land, they can develop it using long-term leases (Tr. 3053–55). Development can proceed with such leases as the University of New Mexico has demonstrated with land it has leased on its campus to residential housing developers (Tr. 3055; see also Tr. 3384–85).

Land is also available for development to the southwest and south of Albuquerque, although the pattern of land ownership may make development difficult. Mr. Carruthers stated that the holding of parcels generally in "very small acreages [makes them] very difficult to assemble and subdivide by present day standards . . . without very expensive land assembly arrangements" (Tr. 3051; see also Tr. 3053).

Government land does not constitute an absolute barrier to development. Military bases have closed and contracts supporting

government activity have ended in areas of New Mexico (Tr. 10941–42; see also, Tr. 6677). Government land can and has been sold for urban development purposes (Tr. 2571–72, 2574–76; see also Tr. 3452–56, [sales by Arizona, including sale in 1960's of land used for Lake Havasu City]). Moreover, Horizon has been aware since at least 1969 that government ownership of land was a removable barrier. In that year Horizon traded some of its land for other land owned by the State of Texas; that land became part of Horizon City (CX 131C).

Between Albuquerque and Belen, there are many subdivisions with what Mr. Pierce described as literally thousands of undeveloped lots. Municipalities between Albuquerque and Belen are Los Lunas and Bosque Farms (Tr. 3167–68; CX 835). To the extent that COG expects future population growth south of Albuquerque in Valencia County, that growth is expected mainly within areas with services such as Bosque Farms, Los Lunas, Belen, and privately developed areas such as the one in Rio Communities and a project in the northeast corner of the county (Tr. 3161–62). Mr. Pierce did not believe that there was [121]any reasonable likelihood that the COG projected population for Valencia County in the year 2000 would be concentrated in any given portion of the county (Tr. 3161).

(3) *Locked-In Growth of El Paso*

75. Horizon's sales representatives included in almost all sales presentations of Horizon City property a statement about the rapid growth of El Paso and its locked-in growth pattern to the southeast toward Horizon City. El Paso also had another feature which was stressed along with the rapid growth, the twin-plant arrangement. The locked-in growth pattern of El Paso is stated to result from natural barriers, government lands and an international border with Mexico. El Paso is represented to be one of the fastest growing cities in the United States, with 43 "twin-plants" operating between El Paso and Juarez, Mexico. The "twin-plant" arrangement involves companies which do fabrication and initial assembly in Mexico and then transport the products back to the United States for finishing and final assembly. Since the import tax is only on the labor, it saves the manufacturer money and makes the operation more profitable. When industry moves into an area, population follows.

Horizon's sales representatives are trained to represent that El Paso's population will almost double in the next fifteen years from 350,000 population to 600,000, but its growth directions are restricted. To the north is government land consisting of Fort Bliss, Beaumont General Hospital, and Biggs Air Force Base. To the

northwest are the Franklin Mountains and a city cannot grow on top of a mountain. To the west is the border of another state, New Mexico (Tr. 1860), and to the south is Juarez, Mexico and the International Border. Thus, it is represented that El Paso can only grow to the southeast toward Horizon City.

CX 157Z1, Z2, 158 M, N, 160V–Y, 163N, O, 178M, N, 161X, Y, CX 615Z15, 778Z10, Z52, 905H, I, 956T, U, are training manuals which carry the locked-in growth story and the twin-plant concept. The locked-in growth concept is visually demonstrated by making reference to TBA maps of the El Paso area during the sale presentation, which visually demonstrate the growth barriers (CX 161X, Y, 216–222). A training manual used since 1971 stated that the twin-plant concept between El Paso and Juarez "is becoming a new industrial zone that will rival the Great Lakes chain of industrial cities" (CX 615V). The Leif Erickson and Merv Griffin films carry both visually and orally the twin-plant concept and the locked-in growth pattern of El Paso (CX 526 O, P, V, 527S, T, Z3).

A Denver dinner party speech, which followed the Merv Griffin film, told prospects about the "locked-in growth" of El Paso:

> Now Horizon Corp. began in 1959 and we didn't go out then and just secure just any raw land way out in the wilderness so to speak, but we only secured land on the outskirts of growth communities of the southwest where as Mr. [Merv] Griffin mentioned where there was a locked-in **[122]**growth corridor—in a community where natural and government boundaries insured that the growth would be in only one direction. . . .
>
> Let me give you the formula that has been successful for families just like yourself [sic] and those taking part in Horizon Corp. in making money in land investments. And the formula would be just this—a location with a locked-in growth corridor—but the second thing is population . . . the tremendous population explosion right here in the United States (CX 858F).

The speaker then informed his listeners they should:

> imagine . . . having land on the edge . . . of a city [which] can grow in one direction and one direction only. To a community that has already been masterminded [and] where the development has already begun with homes and apartments, and industry and recreational facilities (CX 858G).

The speaker continued:

> [N]ow there are just three communities in North America where there is a locked-in growth corridor—a corridor where the community can grow in one and only one direction—. . . they are Albuquerque, New Mexico, Vancouver, British Columbia, and El Paso, Texas—and the one we are talking about tonight . . . is one of the fastest growing communities in the United States and it has a locked-in growth corridor and I would like to talk to you now about our development known as Horizon City on the outskirts of El Paso, Texas (CX 858G).

The speaker also commented that Horizon invested millions of dollars in that development "to make the land values increase," and that this development was in the right location for the "population explosion" in the El Paso area (CX 858H).

Sales representatives testified that they were trained to utilize the locked-in growth pattern of El Paso and that they used this representation in their sales presentations (Tr. 1860, 1929, 2095–96, 2126, 2169, 2185–86, 4388, 4568, 4623, 4686–88, 4733, 4770, 5697, 6014–18, 16529–30, 16501–06). The twin-plan concept was also used by sales representatives (Tr. 4511–12). One sales representative was asked on cross-examination: **[123]**

Q. Did you actually use that phrase, quote, locked-in growth, end of quote?

A. Absolutely (Tr. 4733).

Another sales representative testified:

Q. Did you use the locked-in growth concept for Horizon City?

A. Yes.

Q. Over what period of time was that used while you were training people?

A. The whole time (Tr. 16430).

Q. When you used the term "locked-in" growth, you were not trying to tell somebody that El Paso was going to grow in only one direction, were you?

A. Yes (Tr. 16502).

Customers confirmed the use by sales representatives of the "locked-in growth" pattern and the twin-plant concept for El Paso in the sale of Horizon City property (Tr. 894, 908–09, 1120, 1160, 1190, 1328–29, 1476, 1526–27, 1610, 1687, 1702, 1824, 4992, 5007–08, 6259–60, 6279–80, 6343–44, 6452–53, 6467). One customer, Burnice Carter, **[124]**testified about the sales representative's statements about the locked-in growth of El Paso:

he said what made it so great out there at El Paso was that El Paso was expanding at a very rapid pace and they could only build in one direction and that was directly toward Horizon Properties, because of Mexico on the south, some government property, I believe, Fort Bliss on the north, and mountains on the west.

And he said the only way that El Paso could possibly grow was east right into the Horizon Property (Tr. 894).

(4) *El Paso's Growth Is in More Than One Direction*

76. The geographical features of the El Paso area do offer some

growth constraints. The Franklin Mountains, which rise to 7,000 feet from a 4,000 foot base, are to the north of the city (Tr. 2602–03). The southern boundary of El Paso is the Rio Grande River and the international border with Mexico (Tr. 2603–04). Fort Bliss occupies a northeast triangle with the apex of the triangle pointing right into the city (Tr. 2605–08; see also CX 221, for example). There is, however, a substantial amount of land available to the Northwest and Northeast which can be developed (Tr. 2571–73, 2575–77, see also CX 795, pp. 68–71). Further, El Paso's actual growth has been and is projected to continue to be in more than one direction (Tr. 2598).

Jonathan Cunningham, Director of Planning and head of the Department of Planning Research and Development for the City of El Paso since 1958, was a witness for complaint counsel (Tr. 2506 *et. seq.*). He testified that during the time that he has been Planning Director there has never been a time when El Paso was growing in only one direction, or when it could grow in only one direction (Tr. 2598). He further testified that the reports published by his department have never concluded that El Paso could grow in only one direction (Tr. 2598). These reports include the three major population projections made by his office, in 1963 (CX 795), in 1969 (CX 796) and in 1976 (CX 797). These three major studies were made public and copies were available to Horizon and others (Tr. 2515–17). Horizon representatives frequently visited Mr. Cunningham's office in reference to subdivision maps, transportation plans and other matters (Tr. 2518).

The 1963, 1969 and 1976 studies divide El Paso into zones for population projections. These zones, or planning areas, are: (1) the central city, which is El Paso as it was until the early 1950's (2) the Northwest Zone, between the New Mexico line and the Franklin Mountains; (3) the Northeast Zone in the corridor to the northeast; (4) the Southeast Zone which was broken into two parts in **[125]**1971, which contains the area east and north of Interstate 10 and South of Montana Avenue, and (5) the "Lower Valley" which contains the area South of Interstate 10 to the Rio Grande River, which was separated from the Southeast Zone in 1971 (Tr. 2522). Horizon City is located in the Southeast Zone.

The 1963 study, CX 795, concluded with respect to the high projected El Paso County population of 611,820 for 1985:

> Adequate land is available for their housing . . . The city is expected to expand to the northwest, northeast, and east—that is, to those areas which are not now fully developed (CX 795, p. 47).

The study also concluded that there was "adequate vacant land available for development within the study area to support the projected population of 569,000 residents" in the study area by 1985 (CX 795, p. 66). The 1963 and 1985 land use maps projected increased use of land for residential and industrial purposes in the Northwest, Northeast and Southeast directions (CX 795, pp. 68–71). A cross-mountain road was expected to stimulate housing to the area West of the mountains, in the Northwest sector (CX 795, p. 73).

The 1969 report, CX 706, stated in 1969–70, "The expansion of the city in the three major but widely separated areas will tend to increase" (CX 796, XI). It also stated that "desirable sites exist for commercial and industrial development in the southeast, northeast, northwest and the lower valley areas. These areas are being aggressively developed and desirable locations exist in these areas for single family and multiple unit housing" (CX 796, p. XI; and see maps, pp. 92–95). These statements were based upon a population increase in the study area from 359,261 in 1970 to 520,000 in 1990 (CX 796, XI). The latest report, the 1976 report, revealed projected growth in population in all sectors outside of the central city (CX 797). Mr. Cunningham testified that his office has described El Paso's growth as being a three directional process (Tr. 2611).

The majority of growth in housing units and population which occurred in El Paso City in each year between 1960 and 1970 was in sectors other than the Southeast Sector, as that area was defined up to 1970. Of 26,752 units added, for example, 18,411 were in other sectors (CX 798, p. 4). Mr. Cunningham stated that the Southeast Sector was redefined in 1971 and split into two parts. The portion above Interstate 10 continued to be called the Southeast Sector, the area south of Interstate 10 was named the "Lower Valley." This division occurred in part because of different characteristics of the land and the people living in those two areas (Tr. 2639–40). The majority of growth in housing units between 1970 and 1975 occurred outside the Southeast Sector. Of the 23,892 units added between 1970 and 1975, 17,486 units were outside the Southeast Sector as it was redefined (CX 797, pp. 5–7). **[126]**

In the latest major plan, the City of El Paso Planning Department projected for the year 2000 an additional 99,697 housing units in all of El Paso County, with 90,761 of them within the City. That increase is as follows with regard to the various sectors:

Sector	1975 Total	2000 Total	Increase	Percent of City Increase
Northwest	12,172	37,300	25,128	27.69%
Northeast	20,631	42,376	21,745	24.96%

Southeast	15,800	40,268	24,368	26.85%
Lower Valley	22,554	41,031	18,477	20.36%
Central	45,359	46,402	1,043	1.15%

(CX 797)

Thus, most of the increased housing development during that period is projected to be outside the Southeast Sector.

In Mr. Cunningham's opinion, growth outside the city limits in the remainder of the study area and in the county outside the study area is likely to be shared by the different sectors (Tr. 2591–93; see also testimony of Joseph Lusteck, complaint counsel's expert witness—Tr.7029). In the unlikely event that the Southeast Sector were to capture all of the growth projected for outside the study area amounting to 8,936 units, it would still have only 33.5% of the total projected county growth between 1975 and the year 2000.

A number of other factors demonstrate the availability of land for development purposes in the El Paso area outside the Southeast Sector. The City of El Paso bought 60 sections of land in the Northwest and Northeast Sectors in the early 1950's, evenly divided between those two areas (Tr. 2574–76). A section of land contains 640 acres (Tr. 2573), so the total amount of land bought by the city was 38,400 acres. The city has sold about three sections of land in each sector since that time with those sales beginning between 1967 and 1969 (Tr. 2574–76). The land was sold to developers, mainly for residential, but also for other purposes (Tr. 2574–75). Also, federal land used by the Army in the Northeast Sector was sold to home builders just prior to Mr. Cunningham's testimony in this proceeding. Additional government land in that area was available for that purpose (Tr. 2571–72).

The North-South Freeway in the Northeast Sector was first proposed in 1960; in 1964 the El Paso City Council proposed a bond issue to pay for it. There was widespread publicity a week later when the Texas Highway Commission authorized the freeway and obtained **[127]**authorization for it to proceed through Fort Bliss. In 1970, frontage roads were completed and additional construction has occurred (Tr. 2566). As of the time of his testimony in 1977, it was Mr. Cunningham's opinion, and had been his opinion since the project was first proposed, that the freeway project would stimulate interest in and development of the Northeast Sector (Tr. 2567–68).

There is evidence that a twin-plant arrangement has existed along the International Border between the United States and Mexico (Tr. 4001–03, 2600–02). The program was more active in the El Paso-Juarez area than at other places along the International Border (Tr.

2601). There is conflicting testimony as to the continued viability of the program. One witness testified the program was no longer active. However, Mr. Cunningham testified the program was continuing, but at a slower growth rate (Tr. 2602). Mr. Cunningham also testified that in terms of the number of persons employed, the effect of the twin-plant operations was more significant in Mexico than in El Paso (Tr. 2601). The conclusion to be reached on this record is that there was some basis for the twin-plant concept utilized in Horizon's sales presentations, but it did not have the significance to El Paso's economy and population growth attributed to it in Horizon's sales materials and sales presentations.

N. Use of Property Reports

77. The Interstate Land Sales Full Disclosure Act ("Land Sales Act") became effective in April 1969. 15 U.S.C. 1701. Its format is largely derivative of the Securities Act of 1933 and the Securities Exchange Act of 1934, in that it regulates the sale of property through registration of the property and requirements concerning disclosure of certain material factors. To effectuate the purposes of the Land Sales Act, the Office of Interstate Land Sales Registration ("OILSR") promulgated regulations which became effective on April 28, 1969 (RX 1292A). These regulations required nineteen specific disclosures to each purchaser of land covered by the Land Sales Act, through the delivery of a federal property report (RX 1292I–J). The report was required to be delivered to the customer, and he or she was given forty-eight hours in which to read the report and rescind the contract if desired. The disclosures in the report included such information as the location of the property, the existence of taxes or assessments on the land, the cost and availability of all necessary utilities, the existence of a water supply sufficient to serve the anticipated population, the suitability of the lots for building, the existence of schools, medical facilities, and other necessary public services, the number of homes presently occupied, and whether the lots are presently accessible by public road or street (RX 1292I–J).

Horizon's first federal property reports were dated April 28, 1969, the date the OILSR regulations became effective (RX 246, 199; CX 13, 38). Through the early 1970's the property reports increased in length (CX 3, 26, 40, 46), partially as a result of revisions to OILSR regulations (RX 1293). A major revision of the [128]OILSR regulations was announced on September 4, 1973, to take effect on December 1, 1973 (RX 1294). These regulations lengthened the rescission period from forty-eight hours to three business days

following the consummation of the transaction (RX 1294). The revised regulations also expanded the number and scope of the disclosures to be made in the property report (RX 1294), and added a section entitled "Special Risk Factors" (RX 1294Z15). The special risk factors contain disclosures concerning the uncertainty and lack of liquidity involved in a purchase of land for investment purposes (RX 1294Z15). Unlike the other portions of the federal property reports, which are written by employees of Horizon and submitted to OILSR for approval prior to use (Tr. 12531, 12712, 13068), the special risk factors are written by OILSR (RX 1294Z15).

Subsequent OILSR actions have required the inclusion in the federal property reports of additional warning sections. These sections are interspersed through the report and are often printed in red. These warning sections have appeared in federal property reports since May 1975 (CX 64C; RX 189C, 190C, 191C, 192C). As with the special risk factors section, these warning sections are written by OILSR and not by employees of Horizon (Tr. 12533).

OILSR regulation effective December 1, 1973 required that the front cover of each federal property report contain in bold, bright red letters the following statement:

PURCHASER
SHOULD READ
THIS DOCUMENT
BEFORE SIGNING
ANYTHING

These same regulations also required the front cover of each property report to include a conspicuous statement surrounded by a bright red border which states:

IMPORTANT READ CAREFULLY

Commencing in 1974 Horizon's federal property reports carried these legends (RX 1294Z15–16, Z34, 208; CX 53).

Prior to the time the red warnings were required, the property reports from the first day of use contained the statement: "It is in the interest of the buyer to inspect the property and carefully read all sales documents" (CX2A, 3B, 6A; RX 199B, RX 198A). This statement appears in type the same size as other type on the page; in some instances the statement appears on the second page of the property report. **[129]**

Many of the states in which Horizon sold property required certain disclosures to customers at or prior to the time of signing the

contract (Tr. 12542). These disclosures were generally required in the form of a property report, offering statement, or prospectus. The state property reports generally are summaries of the information submitted to the state as part of the process of registering the lots (Tr. 12530–42). Typically the property report is written by the developer and submitted to the state for approval (Tr. 12541), though several states, such as Arizona, Utah and Oregon, write their own property report, rather than approving a report written by Horizon (Tr. 12541).

Since the OILSR regulations required that every customer be given a federal property report, it is not surprising that sales representatives testified that they were trained to deliver the property report to the customer at the time of the sale and that they followed their training in this respect (see RPF 55B, p. 339). Horizon made it a practice to give each customer a telephone call from Tucson headquarters shortly after the sale had been completed and the papers had been received in Tucson. This telephone call was termed a PR call. One of the questions asked during the PR call was whether the customer had received a federal property report. If Horizon learned the customer did not get a property report, the sale would be voided and the sales representative would lose his commission (Tr. 2347–48, 12909, 12925–26, 13410). There is testimony by sales representatives and customers that property reports were not delivered each and every time a sale was made. However, the significance of the federal property report in this proceeding is when and how this property report was delivered, and the significance the property report had to customers.

In 1969, Sidney Nelson, President of Horizon, sent a memorandum to "ALL FIELD MANAGEMENT" with instructions to make certain that federal property reports were delivered to customers in every case. If it appeared that a federal property report was not delivered, Mr. Nelson threatened termination of the sales representative involved. The memorandum stated that a PR call from Tucson would verify receipt of the federal property report by the customer. Mr. Nelson also pointed out that there are "very definite positive benefits involved in the requirement for a Federal Report in the first place and in the delivery of it to the prospect" (CX 778Z1).

CX 782A, a sales instruction bulletin or brochure used in the Wichita Falls, Texas office had the following instructions:

> Horizon properties are federal and state inspected to assure the property is capable of what we say it is going to do.

Theodore Stone, a former Horizon Zone Manager, testified that

definite instructions were received to deliver the federal property report to customers (Tr. 2005). In respect to the time of delivery of the property report, Mr. Stone testified: [130]

Q. Was anything said with regard to the amount of time before having somebody sign a contract that the Property Report was to be given to them?

A. It was discussed in several meetings as to whether or not it should be given first or in the middle of a presentation or at the end of a presentation.
I don't think that there was a consensus among Zone Managers as to the timeliness of it. I think that Tucson was concerned that the customer did have the Property Report, when they got it; when you first went in the house, or after you'd been there an hour, or at the end of the presentation (Tr. 2005–06).

The training manuals provided significant instructions to sales representatives beyond the mere statement that a federal property report must be delivered to each customer. CX 160, a training manual used from 1970 until 1972, instructed the sales representative not to deliver the property report until the customer signed for the purchase of the property. The sales representative is instructed to state: "This is left with you and you will be able to read it at your leisure" (CX 160Z6). Sales representatives were instructed thereafter immediately to turn back to the Agreement for Deed and the Receipt of Deposit and to state to the customer that each of three copies will have to be signed:

Now, may I use your telephone . . . while I'm doing that would you please make out a check to HORIZON CORPORATION for $160 (CX 160Z6).

CX 161, a training manual used 1970 through 1972, had a prepared close. Sales representatives were instructed to take the pre-typed Receipt of Deposit and the Agreement for Deed and the federal property report from their briefcase and set them carefully on top of the unit map. Thereafter, sales representatives were to explain and sell the exchange privilege, the Horizon guarantee and the PVCC. Then, instructions with respect to the federal property report are as follows:

MR. AND MRS. _____ , THE PROPERTY I HAVE JUST SHOWN YOU HAS BEEN REGISTERED IN WASHINGTON, D. C. WITH THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND THIS FEDERAL REPORT IS YOURS TO KEEP AND REFER TO FOR AS LONG AS YOU MAY OWN THE PROPERTY. [131]

(Make sure the above is said *prior to* surrendering the report, or they will be reading while you are talking.)

(You are now taking the first step in your assumptive close. You are going to assume

that your prospect has purchased and is ready to sign. Don't pause—continue as follows:)

MR. AND MRS. _____, BY LAW I AM REQUIRED TO GET YOUR SIGNATURE THAT YOU HAVE RECEIVED THIS FEDERAL PROPERTY REPORT. WOULD YOU PLEASE . . . . . .

(Turn receipt of deposit to Mr. _____and hand him your pen.)

. . . . . "OK" RIGHT HERE THAT YOU HAVE RECEIVED THIS REPORT?

(If the prospect signs, don't stop getting signatures including the down payment check.) (CX 161Z6–Z7).

CX 163 is a training manual which instructed sales representatives to briefly refer to the federal property report in the front talk, and "Upon completion, replace sample in briefcase," and thereafter to refer to the federal property report at the time of closing along with the Agreement for Deed and the Receipt of Deposit after a commitment to purchase the property has been made (CX 163F, L, R).

CX 178, a training manual approved for use subsequent to May 1973, instructed sales representatives to refer to the federal property report after receiving a commitment from the prospect to purchase the property and to read a few points from the report "e.g., water, taxes, houses, HCIA" and give it to the prospect along with the state property report, if applicable. This delivery of the federal property report is to take place at the time the prospect is signing the Agreement for Deed and the Receipt of Deposit (CX 178R, X, 905N, 615Z30).

CX 180, which instructed trainees to deliver the federal property report in a similar manner to CX 178 (CX 180Z23), also gave instructions not to suggest that the federal government is connected with, sponsors, or backs Horizon (CX 180W). However, sales representatives were instructed to use the federal property report as a sales tool: "By showing our responses to certain questions asked by the Federal Government should add credence to our reputation and image" (CX 180W).

CX 157, a training manual used in 1974 and thereafter, instructed sales representatives as part of the front talk to inform **[132]** prospects that the land development industry is regulated by the federal government, by OILSR, a division of the Department of Housing and Urban Development. The prospect is to be informed that under OILSR regulations Horizon is required to prepare a property report on each of its properties. Sales representatives are

then instructed to bring out the property report, discuss it briefly, then replace the property report in his briefcase:

This (bring out the report) is a sample of one of the reports. (You would then go through the Property Report, highlighting the underlined phrases in the following manner.) For instance, Mr. and Mrs. _____ it tells who we are, where we are located, a description of the subdivision, its location, plus information on utilities, facilities, financing, etc., etc. (Upon completion, replace sample in briefcase.)

Sales representatives are then instructed to give the sales presentation, get a verbal commitment from the husband and wife prospects, fill out the contract papers, get them signed, collect a check as payment, and then state:

Now, Mr. and Mrs. _____ I would like to show you the property report, there are a few points which I would like to bring to your attention.

(Trainee: Read a few points of the Government Property Report e.g., water, taxes, houses, HCIA, and give it to the prospect along with the proper state report.) And Mr. and Mrs. _____ if you would okay that you have received it on this line. (They must sign that line first.) (CX 157P, Z–Z6; see also CX 158R–S, a training manual used in 1973).

Sales representatives testified about the use and delivery of federal property reports. Theodore Stone, a former zone manager for Horizon, testified about the federal property report:

I don't think the Property Report disclosed anything other than the property had been registered in Washington, D. C. It was thick, it was cumbersome, it looked like the U.S.D.A. stamp of approval, and it was a great sales tool (Tr. 2057; see also Tr. 2055). **[133]**

David Roth, employed by Horizon from September 1973 to April, 1975 as a sales representative and sales manager, testified about the use of the federal property report:

[The] way we used to say it, the way we would train, it says, "Pursuant to federal law and state law, I'm required to show you this federal and state property report" and you show it to them. You would initial here that you saw it, and then we would go over it later. And we used to put it away and continue with the close. We used to use the property report actually, if necessary, to button up the sale after it was all sold.

Q. How would you use the property report to button up the sale?

A. The property report we use is an official document. In other words, it had to be sanctioned and approved by the government. If the report was small enough like Whispering Ranch, we would read all 19 questions because it was only a page or page and a half.

If the report was a book like you had at Rio del Oro or Horizon City, then you would just highlight it. In fact, on Horizon City, the only page we ever read was Page 29. Mr. Drizen said that's the only page you have to read is Page 29.

JUDGE BARNES: What was on that page?

THE WITNESS: Use of funds. In other words, what the money specifically was going to be used for in the HICA (Tr. 3712–13). "By reading the property report we felt we were reading the official document" (Tr. 3735).

Olin Hillman, employed by Horizon from 1971 until 1975 as a sales representative, sales manager, district trainer, and fly-in coordinator (Tr. 4653–54), testified on cross-examination about the use of the federal property report:

Q. You used the property report, did you not, to refer to the existence of facilities at the properties you were trying to sell?

A. Yes, sir, only after the Federal Disclaimer.

Q. And, when was that? [134]

A. Whenever they came out with it. I don't really remember when, but up until then, I was trained that the property actually was an endorsement by the Federal Government.

Q. Who trained you to that effect?

A. Schoeneker.

Q. He told you it was an endorsement of the Federal Government?

A. Yes.

Q. What was the item?

A. The property report itself.

Q. Was an endorsement?

A. Yes, sir.

Q. An endorsement of what?

A. An endorsement of the property that what we say in there has been checked and looked at and approved by the Federal Government as being true as stated. (Tr. 4740–41).

Daniel Nickeson, a former regional manager, testified that the property report ". . . was used as a sales tool to show that we had built this number of homes" (Tr. 4524; see also 16514).

Burt Rosenthal, employed by Horizon from July 1972 until April 1976 in the Chicago and Phoenix Offices as a sales representative and sales manager and training manager, testified about the federal property report:

We had a way of, this report, quite frankly, I feel is very incomplete and very vague, and we would always take this question and interpret it so that it would have a positive result, at least as far as a sale would be concerned (Tr. 3512).

Mr. Rosenthal testified that the property report was placed on the table when the contract was placed out. The property report could be delivered at "the same time or it could be after the contract was signed" (Tr. 3544).

David Carpinelli, employed as a sales representative from March 1975 until February 1976, testified that he delivered the property report as part of the automatic close, after informing the [135] prospect how much the purchase would cost. At that time he would point out "the positive things" in the report (Tr. 4616–17).

Milton Doyle, a sales representative and sales manager with Horizon from July 1973 until August 1974, testified about his use of the federal property report:

Q. What were you told about using the property report in a sales presentation?

A. What we had to do was,of course, give the people, and what my sales manager instructed me to do, was to go over the highlights of it. We didn't go into detail. We would point out things like HCIA and the property taxes, the amount of people that were already there, the amount of construction, for example, how far it was from the nearest schools, hospitals, but we didn't go into any great detail, no.

Q. What were you told about giving a customer a chance to read the property report during the sales presentation in sales training?

A. All right; now, we of course gave the property report to them, but I will be perfectly honest, when we were giving the presentation, now they really wouldn't have had a chance to read it because we were giving the presentation and a map talk, the TBA plat map, and of course, we would be going right into the close, hitting for a close. Consequently, if they were reading it, they wouldn't be listening to us (Tr. 4627–28).

Mr. Doyle testified on cross-examination that if the prospect read the property report during the sales presentation it would distract the sales representative and "we would not be able to make a sale" (Tr. 4638).

Other sales representatives testified that the federal property report was merely left with the customer and that customers did not read them prior to signing the contract:

Whether they read it or not, that wasn't an obligation of the salesman,—was to hand it to them and this is their report and they did with it what they want (Tr. 6044; see also Tr. 6070). [136]

* * * * * * *

But you don't go and say, here is a two-hour property report because then people fall

asleep and you have no chance to sell anymore. We were out to make money (Tr. 16108).

* * * * * * *

It was put in the papers. You told them, here is your property report but you didn't go into it. You didn't go into it to give the customer a chance to ask any questions or read it (Tr. 16370).

* * * * * * *

[A]t the close we left it with them. They attested to the fact that they had it and I guess they were supposed to read it, but we just left it there. It would have taken them a long time to read the property report (Tr. 1868).

* * * * * * *

I had to close deals in order to make money, to survive . . . (Tr. 1884).

Alvin Schuman, employed as a sales representative in the Chicago office from 1968 to 1975 stated that:

In a home, you generally brought out the property reports last. After they signed the contract, I'd bring out the property report, hand it to them, they would sign for them and that was it (Tr. 6020).

Other sales representatives made it clear they brought out the federal property report at or subsequent to the actual signing of the purchase contract, and that they did not go into the property report in detail with the customer (Tr. 1868–70, 2347–48, 6010, 6020, 6025, 16370).

Customer testimony as to whether a property report was delivered at the time of the sale is equivocal. Some customers testified that they did not receive a property report at the time of the sale; others testified that they received the property report in the mail a few days after the sale had taken place (Tr. 16161, 16682). The customers who gave such testimony usually had signed a receipt acknowledging that a property report had been received and read prior to signing the contract of sale (see RPF 553, pp. 338–39, [137]558, pp. 343–45). Horizon employees testified that the federal property report was never placed in the important document package which was mailed by Horizon headquarters to the customer (Tr. 12890–92, 12944; CX 292). Customers were told by sales representatives that their signature was needed "here, and here and initial there" (Tr. 16158), without being told what the signature indicated and under such circumstances that they did not have time to read or understand the declaration (Tr. 5929, 5939, 5946, 1700–01, 1276–82). In many cases customers had no specific recollection of having received the report (Tr. 6504–06, 6193, 6195–98, 6417, 1147–49, 16645–48, 16668).

Some customers were adamant in their testimony that they did not receive the federal property report, and it is concluded that there were some occasions when federal property reports were not delivered to the customer at the time of the sales transaction (Tr. 1571, 1598, 1723–24, 1396–97, 1460, 16161, 6346, 6349, 1759–62, 6416–17, 5181, 5929, 5938, 5941, 6195–97, 6232, 6405–06, 6417, 16211, 16674). David Krausse was told to sign the receipt because the property was only going to be available for a short time, and the sales representative would obtain a property report later since he did not have one with him at the time:

Q. Now I'll just ask this. You say you never saw that property report?

A. Correct.

Q. You have signed that you received it?

A. Yes.

Q. But you didn't?

A. Right. I understand the reason for the signature.

Q. I don't. I don't understand why anybody would sign they got something if they didn't.

A. Because the sale of the property would not be available if I had waited long enough to receive a property report. I would have lost the sale; therefore, I signed. I made the contract valid by signing the receipt of the property report in order to be able to take advantage of property which was available for a short time only at Mr. Mason's suggestion. [138]

Q. And thereafter he didn't get a property report to you?

A. No. (Tr. 1761–62).

Burnice Carter testified he signed for a property report even though he did not receive one:

Well, just a human error. I just trusted Ken Wilson [Horizon sales representative] (Tr. 915).

Billy Miley testified that he did not receive a property report at the time of the sale:

Q. Why did you sign this document that you had received it even though you've just stated you did not receive it?

A. Mr. Baker told me that if I would sign it, he could—that he had forgotten the Property Report was in his office, and that if I would just go ahead and sign it, if I would be willing to do that, that he would drop it in the mail to me and I would have it in a couple of days. So, I signed it.

JUDGE BARNES: Did he mail it to you?

THE WITNESS: Yes. I got it. I believe it was two days I got it (Tr. 1503).

Customers all testified they did not read the property report prior to executing the contract of sale (*e.g.*, Tr. 842–43, 855–58, 867, 1054, 1148, 1199, 1334, 1414–15, 1509, 5010–11, 1532–35, 1663, 1667, 1715–16, 1725–26, 1759–61, 6232, 6465–66, 6560–63, 16264). Some of the reasons customers did not read the property reports are recorded cogently in the following testimony:

Q. Did he give you a Federal property report the night that you purchased the property, sir?

A. He showed us a property report.

Q. Did he say anything about that property report to you?

A. Well, in attempting to read it, he commented that when you finish [139] reading it, you will know no more than you knew in the beginning. But take my word for it, the property is good, is a good investment. He said he bought land out there himself.

Q. So did you in fact ever read the property report?

A. No. (Tr. 16244).

* * * * * * *

Q. At what time did you receive the property report during the sales presentation?

A. I don't recall specifically at what time of the presentation I received a property report, but after receiving a property report, I didn't read it.

The reason that I signed the block indicating that I had read it was again out of routine. It was part of the contract. The sale had to be completed at that moment; otherwise, the property would not be available.

I went ahead and signed the space there indicating that I had signed and read the property report, even though it was not possible during that time to read that property report.

Q. Did the salesman say anything about reading the property report?

A. No, he didn't.

Q. Did the salesman say anything about you signing beneath the language on CX–771 that I just had referred to you?

A. He just indicated that my signature there was necessary. It was just a matter of utility to complete the contract, and as I mentioned, I was using his judgment in this matter (Tr. 1715–16).

* * * * * * *

Q. Did you read that document before you signed the contract sir? [140]

A. No, I really didn't.

Q. Did you ever read it afterwards?

A. No, I never have read it.

Q. What were your reasons for not reading it?

A. Well, it was lengthy and I was counting on the statements of the Company and the statements of the salesman (Tr. 5187).

* * * * * * *

[W]hen you purchased your first three lots there: Could you—Do you know the reasons or could you kindly tell his Honor the reasons you did not read the property report?

A. Well, mainly for the casual approach. It was completed in the package, and the salesman said, "Here's a document which we are required to include. You might want to look at it some time." And I inferred from that it wasn't important. And, when I did look it over, I couldn't read it anyway, so I didn't bother.

Q. What do you mean you couldn't read it anyway?

A. The language was too technical.

JUDGE BARNES: Mr. Nesbitt, you have a college degree?

THE WITNESS: That's true.

JUDGE BARNES: And, you still couldn't understand the report?

THE WITNESS: No, sir.

By Mr. Kaplan:

Q. Now, would you kindly tell us your reasons for—on the second occasion when you purchased your second property? [141]

A. They would be the same. The salesman said it was included in the package. "You need to look it over." And, it was the same as the first one, so I didn't bother to read it in detail (Tr. 1230–31).

* * * * * * *

RECROSS-EXAMINATION

By Mr. Mitchell:

Q. Mr. Nesbitt, in answer to a question with Mr. Kaplan, you said that the salesmen on both occasions told you that they were giving you a government report that they were required to give you; is that correct?

A. Yes, sir.

Q. And, you knew it was a report from the federal government; is that correct?

A. That's correct.

Q. And, you further knew that this was something required for the protection of buyers; isn't that true?

A. I didn't know it at that time. He just said it was part of the package; that it was required to be included.

Q. And, he actually handed it to you so you had possession of the property reports each time before you signed; isn't that true?

A. No. It was included in the package, and he pointed it out. He didn't actually hand it to me and say, Here's a property report. Here's this, here's that.

Q. O.K. But, included in that package was the property report?

A. Right.

Q. And, you got it before you signed?

A. Well, in between the signing.

Q. Well, "in between the signing," sir, [142]that's a question of putting a pen on a piece of paper. You didn't stop in the middle of your signature, did you?

A. What I mean is, when we were getting ready to, he was filling out all the forms and everything and said, "Here's the stuff, and you got this, and got that." So, it was before we signed the contract (Tr. 1232–33).

* * * * * * *

Q. Mr. Troyer, did you read any portion of the Property Report when you received it?

A. Not in detail. I may have given it a cursory examination, but I did not read it. I received it, but did not spend the time to go through and read it. It was kind of on an assembly line basis there, and I could tell once he got my signature, he was anxious to get rid of me (Tr. 1334).

* * * * * * *

Q. Did Mr. Biede or Mr. Steer ever mention a HUD report or Federal property report to you during the course of their conversation?

A. No, they didn't because, basically, at the end of the sales conversation, he's pulling out these sales aids and he's saying here's this and here's that and so on. He looks at his watch, you know. I've got another appointment I've got to get to. I've got some other customers I've got to get to. If you have any questions, get back to me. Zoom! He's out the door (Tr. 6507).

* * * * * * *

Q. Do you recall approximately—I'm sorry. Do you recall at what point in the transaction you received the property report?

A. At some point when we were signing the contract and filling out all the forms, he held up the property report and said this was required by the government and we ought to read it some time. I'm not sure if it was before or after we actually signed the contract.

Q. Did you ever read it? [143]

A. Not until several years later.

Q. Now, at the second purchase with Mr. Vosburg, did he provide you with a property report?

A. Yes, he did.

Q. At what point of the transaction did he provide you with that property report?

A. Approximately the same time. Right when we were getting ready to sign the contract.

Q. Did he say anything about the property report?

A. Just said that we should read it some time (Tr. 1198–99).

One customer who received a property report at a dinner party testified:

Q. Did Mr. Rogers say anything about a property report?

A. Well, we did see the property report. And he pointed out to us in effect—underlined the sections that deal with additional moneys we would be assessed each year to the Community Improvement Association, I believe.

Q. Did he point out any other sections of the property report to you?

A. No.

Q. Did you read the property report at any time when you were in attendance at the dinner party?

A. I looked at it but it was a little too difficult to read and too long. I think you would have to sit somewhere in the corner by yourself to really understand it and read it. So, I did not really attempt to read it all because he did seem to be honest and pointed out the moneys we would still owe beyond the property price (Tr. 6454). [144]

O. Use of Unit Maps

78. Each subdivision of Horizon's property is divided into units, each of which is in its turn divided into individual lots or parcels, as noted on the plat map registered with the county (Tr. 12711). The unit map is essentially a copy of the plat. Sales representatives were trained to use the unit maps, and such maps were used in substantially all sales presentations. Unit maps were included in the customer's important document package (Tr. 4640, 12890; CX 292).

Examples of unit maps are CX 237–251, 725; RX 1029A–C. The information contained on the unit map includes, among other things, a graphic explanation of the size and dimensions of the individual lots, along with the existence of any easements which may be contained on those lots. The unit map shows the designations of the property; *i.e.*, single family, multi-family, or commercial. Also shown on the unit map are streets, cul-de-sacs, school sites, parks, walkways, and drainage easements. Streets shown on the unit maps have names (CX 238, 242, 244, 245, 246; RX 1029Z–C, *for example*).

The use of unit maps by sales representatives is stressed in the training manuals. CX 157, a training manual used in 1974, provides the following training on the use of unit maps.

Now, this is our area Rio del Oro and through the pre-determined usage we mentioned before, we know where all the residential, multiple family, and commercial sites and so forth will be—In other words it is completely pre-planned. Now what I've selected for you in order for you to take advantage of this pre-determined usage is two single family homesites right here in Unit 43. Now, Mr. & Mrs. _____ , to explain fully to you what we mean by a pre-developed and pre-planned area—if I were to pull Unit 43 out of here (Trainee: Bring out Unit Map) this is exactly what it would look like. With the carefully pre-planned streets, the neighborhood divided into individual homesites, also the sites that are set aside for the schools.

(In other words, Trainee, whatever is on the Unit map such as park sites, school sites, multi-family sites, you mention to the prospect, and then trainee:) Now, Mr. & Mrs. _____ , the two homesites that I have selected for you are right here in Block 23, Lots 33 and 34. (After pointing this out, Trainee, you get rid of the Unit Map . . .) (CX 157M, N). **[145]**

This training message is included in other training manuals (CX 157Z3, 158 O, P, 161Z–1, Z2, 163K, P, 178 O, P; see also CX 101F, G, 180Z1, 160Z–1, Z–2, 158X, 905L).

Sales representatives testified that they represented Horizon's property to be predeveloped, and that unit maps were used as part of the sales presentation (Tr. 1933, 1931, 16107, 2096, 2323–24, 4387, 4510–11, 4521, 4628–29, 4640, 16327, 8673, 11271). Henry B. Fisher, a sales representative with the Chicago office from 1963 to 1973, testified about the use of unit maps in sales presentations:

Well, we showed them plats describing a future town in the Southwest where there would be Horizon City and El Paso or Rio Grande Estates or something a little bit more developed would be Paradise Hills, I believe, on Horizon's property, and you put this powerful map on a table and you explain it to them that these were the units and these were the recreation areas and these were the commercial and these were the future plans of the company.

So, when a customer bought a piece of property they figured in time there would be a town (Tr. 6060).

Customers testified about the use of unit maps by sales representatives and about the representations which were made respecting the predeveloped or master-planned communities where the property being sold was located (Tr. 1167, 1172–76, 1197, 1227, 1329, 1372, 1474, 1531, 1569, 1748–49, 1825, 4899, 5167, 6265–66, 6295–97, 6425–27, 6487, 16250, 16267, 16653). Some customers testified that they received definite impressions from the sales presentations they heard and from the unit maps they were shown that the property they were purchasing was being developed or would be developed in the near future. Testimony of some of the witnesses is as follows:

Customer Billy Cook:

Q. I show you what has been marked as Commission Exhibit 725 and ask if you recognize it.

A. It's a map of the Horizon City Estates.

Q. Do you remember when you received that unit map, sir?

A. This one?

Q. Yes, sir. [146]

A. It—I received it the night I purchased the property.

Q. O.K. What statements did the salesman make in relation to that map, sir?

A. Well, he just showed me where my lot would be, and schools, and explained, you know, that it was going to build a city in that Horizon Estates there (Tr. 1167).

Q. . . . Mr. Cates never told you, did he, sir, that there was a school out here some ten lots from your lot at the time you bought, did he?

A. He told me that they were going to build a school.

Q. Going to build a school. And, it shows on the unit map that that is a portion, a green portion, set aside for school construction, doesn't it?

A. Yes, sir. (Tr. 1176).

Customer Willard Morgan:

A. Well, I was told that it was a plot layout of land that they planned to develop. In this explanation, Mr. Bailey pointed out that they do not start to sell any land until they make a thorough study of the over-all program planned for that developed area.

Yes, I knew that it was the land, but was told that Horizon people themselves were a developing company and were developing within—well, as I stated previously, within five years they would be well along with the development.

Q. I see.

A. They expected the development to start perhaps as early as three years.

Q. Did the salesman say anything about the availability of schools at your property?

A. Oh, yes. [147]

Q. Would you kindly tell us what he said?

A. Yes. In the property layout, it had provisions for schools, shopping centers, parks. It would be a full-developed community (Tr. 1569).

Customer Carl Troyer:

Q. What, if anything, was said to you, sir, about streets, utilities, and schools?

A. It was pointed out on the maps when we purchased the first two lots that a school would be located in a very close proximity of the lots which were under consideration; that streets and utilities would be in the properties in that particular lot area approximately by the time the lots were paid for, which was a term of seven to eight to nine years (Tr. 1329).

Customer Carmie Ottaviano:

A. . . . [W]ell, from the impression I got by looking at the map and seeing all the streets, I had the impression that there were people there already.

Q. Do you believe that the streets were on there already constructed?

A. I didn't believe they were constructed but he said they were named. The school is named, the streets are named, everything has a name for it. We were just waiting for the construction crews to come in and build houses.

Q. So you knew this was not yet constructed, the streets, the schools, the houses?

A. He didn't say they were and he didn't say they weren't. Just by looking at the map if I were to take a map and put it right next to this you get the impression that here is everything, the streets are laid out. It is just the general impression I got from looking at the map. It looks like a map of a developed area.

You could picture in your mind the houses being there and everything else. Maybe it is the psychological effect of the fact I believed [148]that things were started to blossom already.

Q. Did you read the statement, "The land use plan posed for intelligent use for land where future development can be thoughtfully placed when the area population demands but should not be construed to indicate the preexistence of any structure"?

A. I didn't even know it was on there. You have to understand if this was put in front of your face and somebody says this land in six or seven years will be worth $17,000—and I have to call somebody else and you post date the check—you don't have your money, you got to get it right now or you are not getting it—you are not thinking of things like that at the moment (Tr. 6425–26).

Customer Elsie Colon:

A. If you want the truth, I thought it was developed right then and there. I didn't know until I went on my property visit.

Q. When you got down there, it was developed, wasn't it, to some extent?

A. Not where I had bought.

Q. He didn't tell you your lot was developed? You don't mean to tell us that.

A. When I saw a map on Horizon Corporation, he showed me a map and there were streets and names on that map.

Q. Names of streets?

A. Yes. This is why I had the impression. If the streets have names, if there are streets there, it has to be developed to some extent.

Q. That's the assumption you made?

A. Yes. (Tr. 16250).

P. Horizon's Representations Concerning Itself As A Community Developer

79. Count III of the complaint alleges that Horizon has made representations concerning past, present and future development **[149]**of its properties and the inclusiveness of the purchase price of a lot, and that Horizon used words such as "communities," "community developer," "master plan," "land use plan" and other words of similar import. These words and statements are alleged to represent that substantially all lots are, or by approximately the end of the purchaser's scheduled payments will be, located within a self-contained and fully developed community, and that the price of the lots is all-inclusive. Complaint counsel contends that while Horizon portrays itself as a community developer, and that it master plans its communities, it is not a community developer, and the master-plans add no value to its communities (CPF 2.139–2.145). Horizon contends that it is a community developer and that it does master-plan its communities (RPF 259–67).

Representations about Horizon as a community developer permeate substantially all of Horizon's advertisements, brochures, training manuals, presentation manuals, and the sales presentations of its sales representatives. Representations about its master-planned communities occur as frequently as the representations about being a community developer.

Horizon purchased undeveloped properties, planned and subdivided them; some of the properties were master-planned by Gruen Associates, a well-known planning firm. The evidence is undisputed

that Horizon has spent millions of dollars in its several properties. There are now in the Horizon properties a cumulative total of nearly 10,000 residents and about 3,000 homes, not including the part-time residents in Waterwood (Findings 8–22, pp. 11–16; RX 952, 953, 955, 957–69, 971–78, 1569; Tr. 4005, 15468–71, 15496–98).

The evidence has further shown that Horizon expended millions of dollars in merging with PAT Homes, Inc. to encourage homebuilding in its properties (Tr. 12663). Horizon employed numerous other incentives to attract development, including free transportation to the sites for prospective residents (Tr. 9945, 11831), and discounts for homebuilders (Tr. 9962). Horizon had also undertaken efforts to attract jobs and industry to its properties, including cooperating with the Albuquerque Industrial Development Service (Tr. 10817–18, 10825), offering discounts to companies (Tr. 10826), and offering free land (Tr. 10058).

Under these circumstances, it is concluded that Horizon's use of "community developer," and "master-planned," "land use plan" and "new cities" is not inaccurate or false. These terms, however, were used in a deceptive and misleading manner.

80. Horizon's contractual commitment to purchasers of its undeveloped lots is to construct a road fronting the property within eight years from the time the purchase agreement was executed (Finding 5, p. 10). Horizon made no further contractual commitments with respect to the property, such as maintaining the roads, asphalt surfacing the roads, providing drainage or utilities. The purchaser of the property is on his own and must await a demand **[150]**market to resell his undeveloped property, or await growth and development to reach his property before it is usable and can be developed. Horizon's development program was concerned with its own core areas; Horizon obligated itself to do nothing to develop the lots it sold to thousands of customers.

The record demonstrates that Horizon made many representations in its advertising and promotional materials, presentation manuals, films and oral representations by sales representatives that created the impression that Horizon would develop or cause the property it was selling to be developed. Among these representations were statements that Horizon is a leading land developer in the Southwest. Furthermore, Horizon's national advertising carried representations about the financial integrity of Horizon, its careful selection of land in the Southwest in the path of growth, its planned communities, its accomplishments as a developer, and the growth of its communities (Findings 42–43). Horizon advertisements made such statements as "We sell planned land investments" (CX 254);

and "We build better communities that offer better investment opportunities" (CX 256). CX 275 states:

HORIZON CREATING OPPORTUNITIES

Horizon Corporation, one of the nation's leading land developers, selects large parcels of land strategically located in the path of people and progress. On this choice property, we plan and create exciting new communities such as Paradise Hills and Rio Grande Estates in New Mexico; Arizona Sunsites; and Horizon City, Texas. It is almost inevitable that this land will rise in value as the population there increases, and as the population of big growth cities like Albuquerque and El Paso expand outward toward them.

CX 258 states:

Horizon Corporation, one of the nation's leading developers, believes that the Nassau Counties of tomorrow are in the making today, now, this very minute.

* * * * * * *

We [Horizon] guide our new communities through their initial stages. We put in roads, make utilities available in development areas, install recreational facilities, build residential and shopping [151]areas, and create attractive proposals for industry. In short, we nourish the new community and help it to thrive and grow.

CX 352A–D, widely disseminated in 1972, stated that "The land you buy is only as good as the company you buy it from:"

Horizon isn't just waiting for expansion to catch up with us. On each of its properties Horizon is building planned communities. These aren't just aimless tracts. They're model communities planned for schools, industrial parks, golf courses and country clubs, swimming pools and apartment complexes, tennis courts, utilities, paved streets, churches and pleasant residential areas . . . .

The advertisement also notes that Horizon has total assets of over $150 million, net worth of over $60 million and an inventory of land value of $240 million.

CX 348A–D is an advertisement which received wide circulation in newspaper across the country during 1972. It headlines "Look what grows on the land you buy from us." It also emphasizes "Over $30,000,000 has been ploughed into improvements for Horizon Corporation's land holdings and communities. Read how this will benefit you as a Horizon landowner." "How did we become the leading development company in the Southwest." "We put a lot in so our landowners get a lot out." (See also CX 425M–O.)

Radio and television commercials represented Horizon as a leading community developer in the Southwest (CX 410C, 412A, 413A, 414A, 415C, 416B, 417B, 418B).

The training manuals reflect the message that Horizon is building

better communities and that the corporation is financially strong (Finding 44; see especially CX 615J, 157F, 158G, O, U, 161S, W). A training manual approved in May 1973, stated:

Horizon is a land development firm that creates communities in the southwest . . . We master-plan and make available for development entire communities. In fact, we are one of the largest community developers in the world (CX 178F).

A 1974 training manual emphasized the community in the sales presentation:

Since the emphasis of the presentation is on the *community* itself rather than [152] merely *land* being developed for the construction of homes and other buildings, you must show pictures of the developed area—pointing out such details as architecture, landscaping, geographic locations, planning, etc. (CX 157I).

Telephone presentations which sales representatives used to get appointments (Tr. 2141–42, 2151) also placed emphasis on Horizon's work as a developer. Horizon was described as the "leading developers in the Southwest" (CX 780D), which was "building beautiful communities near some of the fastest growing cities in the Southwest" (CX 780E). These telephone presentations also mentioned that Horizon has "put millions of dollars" into its "developments for homes, shopping, country clubs and golf courses to enhance the beauty and value of the properties" (CX 780E).

Sales presentation manuals emphasize that Horizon is a community developer, a developer of planned communities. CX 195, a presentation manual, devoted a significant portion of its contents to communicating that Horizon is a substantial community developer:

Horizon created, developed and is building . . . Paradise Hills, Albuquerque, New Mexico (CX 195G - includes a series of scenes depicting swimming, golfing, shopping, etc.)

Horizon created, developed and is building . . . Horizon City; El Paso, Texas (CX 195H, includes a similar series of scenes).

Horizon created, developed and is building . . . Rio del Oro and Rio Grande Estates, Belen, New Mexico (CX 195L - another series of scenes).

Horizon created, developed and is building . . . Arizona Sunsites in historic Cochise County (CX 195J-another series of scenes).

Later home presentation manuals repeat the same concept:

This potential appreciation is keyed to the success of the master-planned communities Horizon is creating in the growing Southwest (CX 196F).

Horizon Corporation and its communities have received national recognition (CX 196F,H - series of newspaper clippings in support of the statement). [153]

This is Horizon City (CX 196H, aerial view of area).

. . . as in all our communities, every home conforms to strict architectural standards. (CX 196 O, photograph of house).

Industry and jobs have been brought to the Horizon City Industrial Park (CX 196Q - scene of construction going on).

Horizon Corporation created Paradise Hills near Albuquerque. Here's how Paradise Hills looked when we started . . . and here's how it looks now. (CX 196S–T, scenes of before and after).

Similar representations are made for Rio Communities (CX 196Y, Z, Z–2, Z–3) and for Arizona Sunsites in historic Cochise County (CX 196Z–4–6-plus scenes; see also CX 197M–Z–9 for the same or comparable representations, both printed and pictorial).

The presentation manual relating to Waterwood, the latest of Horizon's projects, carried the message of "community developer":

Horizon's newest community is Waterwood, located on the shores of 140 square - mile Lake Livingston, Texas.

Just 75 miles north of Houston, Waterwood has been master-planned for an area noted for its interest in sports and outdoor recreation.

Horizon has spent millions developing these fine masterplanned communities.

They didn't just happen - Horizon made them happen (CX 197Z–6–9).

The celebrity films also had the message that Horizon is a community developer, that it is building better communities, and that its communities are planned (CX 526, 527; see CPF 2.32–2.38). The Leif Erickson film (CX 526) stated the following:

We acquire large parcels of land situated in regions of dynamic population growth . . .

Horizon guides these communities through their initial stages . . . putting in roads and making utilities available in the building areas, installing recreational **[154]** attractions such as golf courses; building homes and providing shopping; bringing in industry and doing other necessary things to enable the community to thrive and to grow while maintaining its ecological integrity.

Horizon's dedication to complete and thorough planning of its communities and developments provides a great service. Such planning attracts the attention of people, industry and commerce who will use the land for homes and businesses.

Horizon opens the doors of land opportunity to an aware public, who know that the pressures created by the soaring population can be solved by planned new towns and communities. And the same people who appreciate this fact can also see that they gain by owning land in such communities (CX 526R).

This same representation also is made in the film narrated by Merv Griffin (CX 527X–Z–2). Showing areas of Paradise Hills, the audio segments of the films stated:

Paradise Hills, Horizon's first community development, is situated like a crown above Albuquerque, just 12 miles from downtown . . . Paradise Hills was created from a total planning concept devised by Horizon, pioneering in New Town planning. The Horizon Corporation's planning and supervision has made Paradise Hills one of the finest community developments to be seen in the country today . . . (CX 527K; 526Z–12).

The films detail Horizon's efforts in developing its properties. The film segment about Arizona Sunsites states:

Horizon's construction division is always busy. With new families moving in, they have to keep on the go.

Building for different people with different requirements in sizes, styles and types, apartments for those who prefer them . . . and more apartments and attached homes being built.

Providing housing is just one aspect of Horizon's care of Sunsites. In the building **[155]** area, street paving has been installed, and hundreds of trees from Sunsites own tree farm have been planted . . . (CX 526Z–5–Z6).

With respect to Horizon City, the films state:

Horizon is justifiably proud of the Horizon City community development in El Paso County . . . Already industry is moving in, people are building fine homes here, and members are enjoying the Horizon City Country Club and golf course . . . And Horizon has created the beautiful 88-acre Lake Horizon. Owned by Horizon, the lake - in the future - is planned to be the center of a recreation - oriented subdivision (CX 526V).

Dinner party speeches carried references to the master-planned communities that Horizon was developing (CX 601, p.12, 857B, C, E–H).

Brochures and materials sent to customers conveyed the message that Horizon was a community builder. CX 70C states:

Horizon Corporation Building Better Communities in the Growth Southwest.

New Horizons publications were sent to customers (CX 693, 716). These materials continued to portray Horizon as a community developer (CX 489, 503–24; Tr. 5008, 5161, 6265, 6427).

Sales representatives emphasized the message that Horizon was a developer of master-planned communities. Barbara Kelly, a sales representative and a sales trainer who trained hundreds of sales

representatives (Tr. 16422–26), testified that master planning by Gruen Associates was always used—"It was one of the biggest selling tools" (Tr. 16458). She testified that Paradise Hills was pointed out as "a model community to show what Horizon could do and what they potentially will be doing in the other areas" (Tr. 16439). She also testified:

I think the biggest thing that the people were trained on was the company, what Horizon was and who they were and what they were trying to accomplish.

* * * * * * *

The basis of the company was to build new cities in areas where they could buy large parcels of land and plan them right (Tr. 16426–27). [156]

* * * * * * *

Q. Did you tell them anything about the role that Horizon was going to play in the growth of those new cities?

A. Yes.

Q. What did you tell them about that?

A. That Horizon was not a land sales company. They were a land development company. They were actively involved on a permanent basis in the communities and would always be that way. They were going to control the industrial parks, the country clubs, the major shopping centers and, of course, the development company (Tr. 16428).

* * * * * * *

Q. Did you give people any training on who would develop the properties?

A. Yes. Like I said before, the biggest thing when we talked to people, when we trained salesmen was, you were selling company, not dirt. That was just beaten into you. Don't sell dirt. It doesn't matter where people own land. As long as Horizon is involved. They are the people that are going to make it happen. They are not a land sales company but a development company. That is the way we felt (Tr. 16431–32; see also Tr.16453, 16106).

Customers testified about representations that were made concerning the planned community concept (Tr. 841, 1531, 1569, 1608, 1825, 4861, 4864, 4867, 4897, 4899, 6265–66, 6295, 6487, 16624, 16654–56), and Horizon as a community developer (Tr. 1160, 1530–31, 1339, 1371, 1618, 1564, 1569, 1531, 1720, 4861–62, 4864, 4866, 4876, 4996, 2027–38, 5049, 5032, 5035, 5036, 5055–56, 5071, 6084–85, 6180, 6202, 6213, 6252, 6345, 6427, 6452, 6477, 6516, 6486, 6545, 6547, 16202, 16210, 16672, 16626, 16651, 16652). Allen Nesbitt testified that the sales representative told him that Horizon "was opening up various parts of their land in a specified manner and how they were

picking certain sections and opening them so that eventually it would all fall together; the whole development. It wasn't haphazard or anything" (Tr. 1196). [157]

Another customer, John Gothard, testified that the sales representative spoke very highly of Horizon as a land developer:

He spoke of their reputability, made reference to the fact, of course, that they were on the New York Stock Exchange. He certainly described in the course of the evening the organization. He made it very emphatic, made it very well known to me that they were not just selling real estate, that they were land developers property developers. They were interested or perhaps more interested than their clients in seeing that the areas that they were promoting were growth areas, that homes, that shops, that businesses, came on them.

That in a word, what I am saying they were not merely sellers of land. They were, and if I may quote Mr. Kann developers. (Tr. 6083–84; see also Tr. 6090, 6118).

Q. Horizon's Community Improvement Associations and the Installation of Utilities

81. Certain of Horizon's subdivisions are subject to Horizon Community Improvement Association ("HCIA") annual charges. These subdivisions and the applicable charges are as follows:

Rio Communities

Canyon del Rio	All units Effective 5/1/74
Rio del Oro	All units Effective 5/1/72
Enchanted Mesa	Unit 4 only Effective 5/1/73

The annual charges are $10 per lot per year for a duration of 40 years (CX 154B).

Tierra Grande lots are subject to an HCIA charge commencing October 1, 1973 and continuing for 40 years as follows:

5 to 10 acres	$20.00
10 to 20 acres	30.00
20 to 40 acres	40.00
Over 40 acres	50.00

Tierra Grande lots that are further subdivided will be subject to charges based on the size of the lots as set forth above. Exempt from the charges are lots with no buildings or structures thereon, and lots owned by Horizon (CX 154C). [158]

Horizon Estates

Horizon City Estates	All units	May 1, 1971
Mountain Shadow Estates	All units	May 1, 1971
Horizon View Estates	All units	May 1, 1976
Mountain Vista	All units	May 1, 1976
Horizon Hills	All units	May 1, 1976

Single family	$ 13	per year
Multi-family	$ 20	per year or $10 per year per dwelling
Commercial	$ 3.90	per 1,000 square feet of lot area

The above charges are subject to an annual adjustment based on increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers and are applicable for 40 years (CX 154D, E).

Waterwood property is subject to a Waterwood Improvement Association annual charge and a capital improvement charge. The annual charge is $120 per year for single family homes and continues until the year 2010 with a provision for automatic ten-year extensions. Single family lots are also subject to a capital improvement charge of $2,000 per lot. The Waterwood Municipal Utility District also imposes an annual ad valorem tax of $1 per $100 of assessed valuation in order to provide water, sewer and drainage facilities. All lands within the utility district are subject to this tax (CX 154G, H).

The HCIA for Paradise Hills was being activated as of the time of trial in this matter (Tr. 13130).

CX 5, a federal property report for certain subdivisions in Rio Communities, explains generally that the purpose of the HCIA organization for the Horizon properties in New Mexico is to promote and develop the common good and social welfare of the residents. The HCIA shall have the power, *inter alia,* "to construct, install, extend, operate, maintain, repair, and replace utilities, systems, services, or other facilities on such property for the welfare or betterment of such communities or residents thereof; . . ." (CX 5L; Tr. 13191).

CX 35, a federal property report of the Horizon City properties, explains the general purpose for which the HCIA was organized (CX 35J–L, Z52–Z62). The HCIA is authorized, *inter alia,* to apply funds for the construction, operation, repair or maintenance of drainage systems, roads, facilities for the collection and disposal of garbage and sewerage, utility systems, communication systems, educational buildings, hospitals, and numerous other activities for the benefit of the property and to promote the common good and social welfare of the residents of the communities (CX 35,K, Z–56).

With the exception of Waterwood, the HCIA's have the power to

perform the above services, but they do not have the obligation to [159]do any of the listed activities (CX 35Z–52–Z62 for example).

As of December 31, 1977, the HCIA's had the fund balances shown below:

Waterwood Improvement Association	$1,088,211	(RX 1486)
Horizon City HCIA	5,040,194	(RX 2490)
Tierra Grande HCIA	93,031	(RX 1502)

The Rio Communities HCIA had a fund balance of $2,617,755 as of December 31, 1974 (RX 1497), an increase in the fund balance of $1,565,465 from 1973 (RX 1497). As of 1978 the annual assessment level of the HCIA's was estimated to be $2.5 million and the annual income was estimated to be $675,000 (Tr. 13221). As of December 31, 1978, it is apparent that the HCIA's had in excess of $15,000,000 in fund balances.

All HCIA's enjoy exemption from federal income tax and their activities are accordingly limited. Wesley Roark, Executive Administrator of the HCIA's, testified that to date no HCIA has installed or extended any utility lines or systems (Tr.13191). The Tierra Grande HCIA has considered a possible extension of telephone lines, but no action has been taken out of concern as to the effect of such action on the tax-exempt status of the HCIA (Tr. 13192). Internal Revenue Service has authorized the HCIA's to maintain, but not to construct, public roads (Tr. 13192–93), and the HCIA's have expended funds on road maintenance (Tr.13173).Services that benefit individuals might jeopardize the tax-exempt status, and subject the HCIA's investment income to federal income tax (Tr. 13194).

Count XIII of the Complaint alleges that Horizon has represented that improvement associations which purchasers are required to join will increase the value of Horizon's land, when such is not a fact. The issue alleged by Count XIII of the Complaint is whether the HCIA will increase the value of the purchaser's land; the Complaint does not place in issue whether a purchaser will get full value for his HCIA payments.

Count XXVII of the Complaint alleges that Horizon utilizes contracts that subject a purchaser to pay annual assessments to an improvement association which purportedly is to provide improvements, amenities and services which Horizon has represented it will provide. It is further alleged that the associations have the authority to use their funds for such purposes but (i) the association has no obligation to spend the funds for the individual purchaser's lot, and (ii) Horizon has represented that it will provide, at no additional cost,

the improvements which the associations are authorized but not obligated to provide.

The record contains evidence of some expenditures which the HCIA's have made in the past. The HCIA's have expended $75,000 for a study by a planning and engineering firm, DeLiew, Cather and Company, **[160]**Chicago, Illinois, to provide the HCIA's with a set of guidelines and recommendations for future expenditure of HCIA funds (Tr. 13161–63). Other expenditures by the HCIA's include funds for an interim study by Gruen Associates, expenditures of $20–$30,000 for road maintenance in Horizon City, $286,000 for a park in Unit 4 of Enchanted Mesa [a developed unit within Rio Communities], $18,000 for road construction fronting the park and $48,000 for maintenance of the park, $36,000 for excavating and preserving an archeological site, $25,000 toward construction of a hospital in Belen, $10,000 for a volunteer sheriff's patrol for Rio Communities, $7,500 for a patrol car, $9,800 on a recreational program, $30,000 to be spent on a search and rescue vehicle for the fire department, and $3,300 to improve the green belt in Unit 4 of Enchanted Mesa (Tr. 13163–73).

Complaint counsel's expert witnesses, Dr. Howard Stevenson and Joseph Lusteck[3] testified that the future accumulation of HCIA funds could not begin to touch the financial requirements for an infrastructure to cover water and sewer for the communities (Tr. 6690, 7094). Expenditures for certain projects cannot be made without jeopardizing the tax-exempt status of the HCIA's (Tr. 13192, 13194–96). Thus, expenditures by the HCIA's may be limited to items such as those that have been in the past—parks and recreation, volunteer security arrangements, contributions to hospitals, etc.

Complaint counsel introduced no evidence to demonstrate that expenditures, such as have been made in the past, do not enhance the value of the property in the communities. Common sense would dictate a conclusion that having a park, maintaining roads, a security patrol, a nearby hospital, a rescue vehicle, a recreational program, etc. would add some value to a community. The HCIA's have discretion to spend funds for the welfare and betterment of the communities or residents; there is no obligation to spend a particular purchaser's funds for that purchaser's lot (CX 5L; Tr. 13191). As has been demonstrated from past expenditures, some lot owners will benefit more from HCIA expenditures than will others. For example, the Rio Communities HCIA has spent $286,000 for a park in Unit 4 of Enchanted Mesa, $18,000 for a road fronting the park, $9,800 for a

[3] Qualifications of these witnesses will be set forth subsequently in this decision (Findings 101, 103).

recreational program, and $3,300 to improve the green belt in Unit 4 (Tr. 13163–73). Only residents presently living in Rio Communities benefit from these expenditures and from the expenditures for a hospital, a rescue vehicle and a sheriff's patrol car. Thus, the residents of Enchanted Mesa Unit 4, and other residents of Rio Communities, have received substantial benefits from HCIA expenditures, while an undeveloped lot owner four miles away has paid the same HCIA assessments as an owner of a lot in Unit 4, but has received no benefits from such payments. It may be years, if ever, before some lot owners will receive any tangible benefits from the HCIA funds to which they contribute and are obligated to contribute for a 40 year period. It is grossly unfair to require lot owners who have little chance of ever having their lots developed to continue to contribute to an HCIA fund. **[161]**

82. Horizon sales representatives were trained to mention the HCIA's in their sales presentations and to utilize the HCIA's as a sales tool. CX 778Z–57, a sales memorandum issued in 1968, trained sales representatives that the accumulation of funds would have a positive effect on the property and that the HCIA should be used as a "sales weapon." A training manual for Rio del Oro, issued May 1969, refers to the HCIA as assured funds for future progress. This training manual continued:

> To help Rio del Oro grow and prosper, Horizon has established Horizon Communities Improvement Association, Inc. of New Mexico, a non-profit membership corporation.
>
> What could HCIA do to further progress? It could, for instance, provide facilities to help new industry locate in Rio del Oro. HCIA could build neighborhood swimming pools, develop parks and libraries, extend utility mains—any legitimate use that benefits the future residents or community.
>
> To accomplish its aims, HCIA, through affirmative covenants, will accumulate funds at very little cost to each lot owner. The small annual charge would create a fund to promote the general health, welfare, recreation, and culture of the future residents (CX 958L).

CX 957, a training manual used in the Philadelphia office in 1970, states that the HCIA can provide improvements such as a library, school, church, or community [center], which will add prestige and value to all the land (CX 957E).

CX 180, a training manual used in 1970 and thereafter, described the advantages of the HCIA's:

> The most outstanding advantage of this unique program is that it provides funds for future development. Where most communities get into trouble is raising money for

needed improvements. Our communities under HCIA will be much farther ahead financially as well as in all other ways (CX 180X).

A training manual used in 1970 and subsequent thereto, refers to the HCIA as a guaranteed source of funds for the betterment of Rio del Oro. It also states that the accumulation of $one-half million per year makes the HCIA very attractive (CX 160Z–1). Other training manuals used from 1970 through 1974 instructed the sales representa[**162**]tives to read from the federal property report about the HCIA (CX 157P, Z–6, 158S, 163S, 178S, 905N). Some training manuals were silent as to the HCIA's (CX 159), as are the dinner party speeches in the record (CX 601, 857).

Training material used in 1970 has the following:

How much will improvements cost me?

All of the development improvements will be paid for by the developer. The community improvements will be made by the HCIA and you will participate in this with a yearly contribution of $10.00 per lot. (Explain benefits of HCIA) (Do not let him assume role of the developer. Keep him as the investor only) (CX 781D; Tr. 2133, 2143–44).

The Merv Griffin and Leif Erickson films have comments about the HCIA's:

Added to the Gruen plan is Horizon's unique concept for community betterment . . . . The Horizon Community Improvement Association . . . a plan that provides funds to assist community growth and promote the general welfare of landowners and residents (CX 526Z16, 527Z17).

83. Training manuals are completely silent as to training on utilities. Sales representatives were not trained to affirmatively discuss utilities, whether there are utilities on the property, who will provide utilities, or what utilities will cost (CX 157, 158, 159, 161, 163, 178). The training manuals, however, do have special training on selected questions. While these questions refer to the "development" on the property, the questions and answers would provide an opportunity to state that there were no utilities on the property, which is not done. CX 157, a 1974 training manual, has the following questions: "What Is On The Property At This Time?" The suggested answer is:

Of course, Mr. Prospect, as we pointed out before, the property we are discussing this evening is in the predeveloped stage - so obviously, there is nothing on it, at this time. However in our developed area, we have . . . (Trainee: Refer to the TBA map section covering existing improvements . . .) (CX 157V, see also CX 158, 159Y, 163W, 178).

The back sides of TBA maps indicate that utilities are not included

in the lots. This information is set forth in regular size type and is included along with substantial information about the [163]nearby city and other general information about the community (CX 209B, for example).

Sales representatives were trained to read from the federal property reports about the HCIA's (CX 157P, Z6, 158S, 163S, 178S, 904N; Tr. 679). These reports recite the powers of the HCIA's to "construct, install, extend, operate, maintain, repair, and replace utilities . . ." (CX 5L), and to apply funds to construct drainage systems, utility systems, garbage disposal systems, etc. (CX 35J–L, Z52–62). Some training manuals specifically suggest to trainees that the HCIA's can "extend utility mains" (CX 958I).

CX 956, a training manual used in the Philadelphia office, stated:

> We plan the ultimate use of these tracts, earmarking areas for home, commerce, industry, recreation and long-term investment and then we guide these communities by putting in roads, making utilities available, building homes, recreational attractions and bringing in industry (CX 956E).

The celebrity films (Merv Griffin and Leif Erickson films) make the following comments about utilities:

> Horizon guides these communities through their initial stages . . . putting in roads and making utilities available in the building area, installing recreational attractions such as golf courses; building homes and providing shopping . . . (CX 525R, 527Z1).

* * * * * * *

> Horizon was determined that Horizon City would not be just another development . . . . Over 3½ million have already been invested in property improvements . . . paved and unsurfaced roads, water and sewer systems, and visual attractions like beautiful Lake Horizon which is intended to be the center of future recreational subdivisions (CX 527 Z5; see also CX 526Y).

Sales representatives testified about their use of the HCIA in their sales presentations. One sales representative and sales trainer, employed by Horizon in 1970 and 1971, testified about the HCIA: [164]

> Well, that was one of our big sales tools that we would say that an ordinary development, you know, if the developer pulls out and leaves, then, you are stuck. You might not make any money, but that is one of the good things about Horizon Community Improvement Association, that each lot owner was putting $10 a year into the fund, which would make $1 million in the future to build roads, to put utilities in, and bring industry.
>
> So, with or without Horizon Communities, or Horizon Corporation to develop it, it would grow and prosper and make the land worth a lot more money.
>
> Q. And did you communicate these ideas to salesmen you were training, also?

A. Yes, sir. (Tr. 2160–61).

One sales representative testified that he would read page 29 of the Horizon City federal property report (CX 27Z4) which deals with the HCIA:

We'd read the page and we will tell them that the money was going for schools, parks, improvements, streets, shopping centers and so forth and so on (Tr. 3713; see also, Tr. 4679).

Olin Hillman, a sales representative, sales manager and district trainer, told prospects the HCIA was a collective effort of the landowners to guarantee the improvement of the communities,"the maintenance and upkeep and stuff like that" (Tr. 4678–79).

Barbara Kelly, a sales representative and sales trainer from 1969 until 1972, testified about the HCIAs and utilities:

Q. Did you indicate whether the HCIA's would have a role in possibly providing utilities to any of the land?

A. Yes.

Q. What did you train people in that regard?

A. The whole picture, in other words, this money—and it was millions of dollars over the years that it would be accumulated. That would secure the money to be able to expand the **[165]**developments way out in the foothills for the property.

JUDGE BARNES: I don't believe that answered the question about specifically utilities. What did you tell the people about HCIA and utilities?

THE WITNESS: Well, just that. Specifically I couldn't tell you what I said three and four years ago. The monies being brought into HCIA, which was their money, was going to be used for parks, playgrounds, roads, extending, you know, through all parts of the community, which is all the utilities.

JUDGE BARNES: How about electricity, water, sewer?

THE WITNESS: That was all part of the utilities, yes (Tr. 16440–41).

Customer testimony reveals that purchasers were informed that Horizon or the HCIA, or both jointly, would put in the utilities. In many instances the question of installation and payment for utilities was left vague. Burnice Carter understood from the sales presentations he received that asphalt streets were in by the lots he purchased, and utilities would be in within a few months (Tr. 911, 965). Allen Nesbit understood from the sales presentation that Horizon and the HCIA would jointly build the utilities out to his property and that the HCIA assessment would cover the costs (Tr.

1197). Billy Cook believed that utilities "was being laid in or was going to be laid in" (Tr. 1183–84) and there would be underground cables. "There wouldn't be no poles or anything like that" (Tr. 1160).

Carl Troyer was told by the sales representative that the HCIA would pay for streets and utilities:

> Q. Was anything said to you about who would pay for putting in the streets and utilities?
>
> A. An explanation was given of the Association of Home Owners, which the annual dues that was paid in this association, would go towards building streets, and utilities, and improvements in general on the property (Tr. 1329).

Patsy Zecco understood from the sales presentation that utility taxes and HCIA payments would improve the roads and place utilities to the lot line and all you would have to do was "hook up **[166]**to them" (Tr. 1621). David Krausse testified that "there was very little said during that presentation about the specifics of what Horizon was committed to, in terms of developing the property" (Tr. 1719). Jose Medina was informed by the sales representative at the time of a property visit that "your gas and water and sewer, everything is underground . . . . I took him to mean it meant that the things were underground then" (Tr. 5000). Mr. Medina was not familiar with the HCIA until he received his bill for the first year's assessment (Tr. 5001). Joan Wild was informed that Horizon was going to start "right away" to put in "paved streets, curbing, gutters and all" to the multi-family lot she purchased (Tr. 5036, 5056–57). Helen Anderson assumed from the sales presentation that Horizon would take care of utilities on her Whispering Ranch property. The sales representative, however, did not specifically say Horizon would pay or would build the roads and utilities. "No, he was very vague about all that" (Tr. 6213, 6202, 6180). Robert Pernini was under the impression that all utilities would be put in to his commercial lot by the end of his contract payments in eight years. "In other words, I wouldn't have bought the property assuming I had to go out there and lock in my own utilities" (Tr. 6296). Douglas Thornby purchased a Whispering Ranch lot and questioned the sales representative about utilities:

> And, also I asked him the question directly when it's time to build, does Horizon put in the roads, do they bring the utilities up to the property line. Now I understood in construction you had to pay from the property line to your house for your phone, for your water, gas, electricity and so on. And I had an idea of how that worked and he said oh yes, Horizon will provide the utilities, will put in the roads, they'll put in the curbs, they'll put in the sidewalks. They take care of all that. And basically, it's really the conversation. He's pulling out the papers and keeps asking now how does it sound. Does this sound like a good investment to you (Tr. 6477–78, see also Tr. 6486).

Nancy Tweedy purchased a Whispering Ranch lot and she was informed by the sales representative that roads were in and that Horizon would put in the utilities—"this was going to be like a suburb like they're building around Chicago"(Tr. 6547). Grace Swanson was told that her four lots in Rio del Oro were in the next unit to be developed and that "roads were in and some of the utilities were being put in" (Tr. 16192). Austin Anderson was shown brochures during the sales presentation. He received the general understanding that utilities were already in to the four lots he purchased: **[167]**

JUDGE BARNES: What were you told the development was?

THE WITNESS: Well, from what he showed us in the motion picture and the brochures and what he had said, the utilities were in, the water is in, roads are in, and the recreational facilities are in.

Q. That includes schools and shopping centers?

A. Schools and shopping centers. There was going to be jobs available because some large concern associated with production for the military would be building a plant not too far distant (Tr. 16267).

James Devlin was shown brochures of homes that would be built on the property he purchased and he was told by the sales representative he would have to build within six or seven years and that Horizon would put roads, water and utilities to the four lots he purchased in Rio del Oro: "I took the man at his word. The man told me that utilities were going to be in and water was going to be in and roads were going to be in" (Tr. 16652, see also Tr. 16624–26, 16651).

Evelyn Tracy understood that utilities would be at her lot as part of the "package":

Q. Were there utilities available to your lot at the time you purchased?

A. Well, I thought there were. No, this is what I understood, because we talked quite a bit about utilities, because being in Denver, there, there was always talk in the newspapers and on the news about the difficulty of increasing the utility services for new subdivisions; water, sewer, electric, things like that.

So, we were talking about that, now, not specifically on my lot, but I—you know, he said, "No need to worry about that. You could just hook up right to the city." And I presumed, anyway, from that, all you had to do was go out in the back of the lot, go out and hook up because that's the way subdivisions are where I was.

Q. Did that apply to electricity as well?

A. Yes, all of the water, electric, sewage, everything. **[168]**

Q. Did he tell you who was going—

A. Because I know that water is a big item out west. It is in Denver and I know it would be in Albuquerque and that was really important to me.

Q. Did he say who was going to pay for providing the utilities in the vicinity of your lot?

A. In the vicinity? Well, I just presumed that that was part of the package is that they were there, you know (Tr. 5925–26).

R. Satellite Communities

84. Sales representatives made representations that Horizon was going to start satellite communities at various locations in the different properties which would spur development in areas distant from the existing core areas. Anthony Zimmer, a sales representative employed in the Chicago office from December 1970 until April 1972, testified that pilot communities were mentioned by himself and other sales representatives as part of the general presentation that was normally made. Horizon would establish pilot communities throughout the properties "so people that would be purchasing in that area wouldn't have to wait ten or twenty years before development would be there" (Tr. 6146; see also Tr. 6145–50). Julian E. Parodi, a sales representative in the Denver office, testified that Horizon would start developments in various areas throughout the communities (Tr. 4421, 4428, 4433). Marlene Dmitry, a sales representative and sales manager employed by Horizon from February 1970 until July 1975 in the New York and Brooklyn offices, testified that talk about satellite areas "infiltrated in the salesman's head and you infiltrated it into your client's head," but nothing was ever done about starting up a satellite area (Tr.16113). Barbara Kelly, a sales representative and sales trainer employed from September 1969 until September 1972 in the Philadelphia office, testified that she used the satellite core concept in sales presentations and in sales training:

That was the Horizon concept. There was no way they could develop that much land sitting in one area. Their whole plan was to go out and start satellite communities in each area. Then it encompassed the whole thing and the area would grow in (Tr. 16444; see also Tr. 16442–44).

Customers testified that sales representatives made representations about the development of satellite areas. Allen Nesbit testified that the sales representatives "showed us how Horizon was opening up various parts of their land in a specified **[169]**manner and how they were picking certain sections and opening them so that eventually it would all fall together; the whole development. It

wasn't haphazard or anything" (Tr. 1196). Joan Wild was told that the 5-acre lot she purchased in Canyon del Rio could be divided into lots ½ acre in size and that in just a few years she could get $10,000 per lot because Horizon was going to start a satellite nearby "immediately" to encourage people to move into that area (Tr. 5035; see also Tr. 5055–56).

Horizon's internal surveys of its sales offices confirm that representations were made that satellite developments would be started by Horizon (CX 927G, I, 929I).

S. Easements and Physical Features

85. Counts IX and X allege that Horizon has represented that all or substantially all of the land within a designated lot is now or will be fully usable by the owner when, in fact, various easements and other physical features affect the full use of the lot. It is further alleged that Horizon has failed to clearly and conspicuously disclose the existence and significance of these easements and physical features.

Horizon's promotional materials state that lots are subject to certain easements. For example, the unit map for Whispering Ranch (CX 249), which refers to the lots as being five acres in size, points out that each lot has a 20-foot perimeter easement on all four sides. Similarly, CX 356E, a newspaper ad for Tierra Grande, states "There are some parcels subject to easements of unusual size. After deducting these easements, the smaller amount of land in any parcel is 3.6 acres." The unit maps point out all easements (*e.g.*, RX 1029), and the size of the lots (CX 246). The TBA maps describe the major easements (*e.g.*, CX 230B). The Agreements for Deed, although they do not give the size of the lots, point out the existence of easements on the lots (CX 147A, 151A).

Horizon's representations were that its lots were "fully usable" as building sites for single family residences, multi-family residences, or commercial establishments, as the case may be. Nowhere in this record is there any indication that purchasers were informed that the lots were not "fully usable." Unless customers were explicitly informed otherwise, which they were not, it can be assumed customers understood the lots to be fully usable (see RPF 356). There is no record evidence on the understanding which Horizon's customers had of a "fully usable" lot. There is no testimony from sales representations or customers in respect to the easements on Horizon's properties. In the absence of specific record evidence, it is concluded that a fully usable lot is a lot which can be used for normal

building purposes; *i.e.*, residential, multi-[170]family or commercial.[4] There is no evidence in the record to suggest or infer that the easements which existed on individual lots or parcels prevented the lots from being "fully usable," as that term is generally understood by the public.

86. There is no record evidence that Horizon informed any customer of the existence of physical features which could affect the full use and enjoyment of any of Horizon's property. One real estate broker, Ruth McCaughey, who is familiar with the Whispering Ranch property, testified that there are a number of washes in that property:

> . . . its a place where water flows quickly in the desert. And there are a number of those in the area. It can be from 10 to 30 feet deep in places (Tr. 3253).

She testified that these washes can be 30 to 40 feet wide and they occur every quarter to half mile in the property (Tr. 3254). This witness also testified that the owner of a 5-acre parcel could still use the land and build a home even though it had a wash through it (Tr. 3266). Roy Humble testified about washes in Whispering Ranch (Tr. 3607, 3626–27).

Whispering Ranch was sold as undeveloped property. However, representations were made that Whispering Ranch would be developed; it would look like Sun City or a suburb of Chicago (Finding 83). Further, customers were told and Horizon's brochures represented that their 5-acre parcels could be divided into individual building lots (Finding 88; CX 486). It would be difficult to build a residence on a small quarter acre lot that had a wash. The record does not show that any specific lot with a wash was sold to any specific customer; however, of 3,827 Whispering Ranch lots, 3,521 had been sold as of August 2, 1975 (CX 873F). It is reasonable to assume that some lots with washes were sold. It is concluded, therefore, that having a wash on a 5-acre parcel does prevent the parcel from being "fully usable" within the representations made by Horizon and within the general understanding of those words, where the purchaser was not fully advised of the presence of a wash on the property.

Joseph Lusteck, an expert witness who testified for complaint counsel (Finding 103, 104), observed physical features in Horizon City which concerned him:

> One thing that concerned me, and I perhaps was worried about it because I had lived in that part of the country, they have what they call an arroyo out there, which is a

[4] Joseph Lusteck, an expert witness who testified for complaint counsel, testified that a prerequisite for the use of lots for urban purposes is that they ultimately get improved in a manner consistent with contemporary competitive development standards (Tr. 7044).

[171]drywash except when it rains, and I have personally observed substantial flood water come through an arroyo in Tucson, which was my home, and in El Paso on one occasion.

These washes cut across the roadways and where you find that, when we went on one field trip with a local surveyor who took us out in his truck, those roads are impassable in some places.

Q. Are you talking about Horizon City roads?

A. Yes. They are dirt roads cut in straight lines and the arroyo comes across. When it cuts across the road it brings the sand and everything with it and washes the road away and you can't get through those places. Someone must come with a grader to smooth the thing out so you don't fall into a hole.

Some significant work would have to be done on those arroyos, say where they cross the roads, so that someone wouldn't be in a car and inadvertently drive into one of those things. I think if you look in the newspapers in Southwestern communities you will find occasionally somebody drowns.

Recently, the National Flood Insurance Administration has prepared flood prone area maps for the El Paso area, part of the National Flood Insurance Program. These flood area maps demonstrate more problems associated with those arroyos.

There are arroyos running through the subdivisions and some attempts were made in the development plans to contain the arroyos, but they meander and the flood plain is very wide according to the maps I looked at, and consequently, there may be some of those lots that would be unbuildable for flood protection.

It might prevent HUD or VA or a federal instrumentality from making a loan on a house in a flood prone area unless the elevation is raised up and some other conditions are met. So that might physically inhibit the development of some lots. That is not an extensive problem in a project of this type but it would have some effect (Tr. 7045–47; see also Tr. 7176–77). [172]

There is no record evidence that any specific Horizon City lot located on or near an arroyo or on a flood plain was sold to any specific customer (see Tr. 7177). However, as of August 21, 1975, 114,194 lots out of a total of 139,507 lots had been sold (CX 873C). It is a reasonable assumption that some of the lots that were sold would be affected by the arroyos and flood plain in Horizon City.

There was testimony about arroyos, earth mounds and malapi in Horizon's Paradise Hills Property. William Kelly, a former Horizon sales representative and sales manager and at the time of his testimony a real estate broker located in Paradise Hills, testified that in his opinion approximately one-half of the lots in Paradise Hills Unit One were unbuildable. His reasons were arroyos running through the unit and mounds of earth that would have to be restructured or rebuilt in order to build on the lots (Tr. 16558–60, 16586–88, 16591–96). The arroyo in Paradise Heights Unit One runs through the entire unit from West to East draining towards the Rio Grande River. Its depth varies from four feet to twelve feet and its width varies from five feet to thirty feet (Tr. 16618). The mounds of earth range from 15 feet to 30 feet in height and one hundred to two

hundred feet in width. The cost of removing or restructuring the mounds would make the cost of the lot prohibitive for an individual. In addition, a group of lot owners would have to get together and agree on removal of a mound in order to make the work practicable (Tr. 16591–96, 16794). Mr. Kelly testified that there was a substantial amount of malapi in the area and that no one knew for certain the extent of the formations (Tr. 16610–11; see also Tr. 16783). Malapi is defined as a volcanic rock, essentially lava (Tr. 16780).

Fred Denny, Chief Executive Officer of Fred Denny & Associates, a consulting engineering firm that has done engineering work in Paradise Hills for Horizon (Tr. 16773–74), testified that there were no lots in Paradise Hills Unit One that were unbuildable because of an arroyo (Tr. 16775). He testified that arroyos are recognized in the planning and design process; they are channelized and placed in the streets to be managed (Tr. 16776). He also testified that this would necessitate the assembly of a number of lots so that you could have an area grading program (Tr. 16777, 16795). Mr. Denny testified that the mounds or "knolls" could be graded down and removed from the site to allow building (Tr. 16778). He further testified that Paradise Hills has malapi and that there has already been some development on lots containing malapi (Tr. 16780). The lots are developed by cutting the malapi, hauling it away and importing fill material (Tr. 16782). Mr. Denny testified that an individual owner would have difficulty with a mound on his lot, and that controlling an arroyo might clip some lots and there would be the additional expense of containing the arroyo with a wall, bulkhead or rock rip-rap on a slope (Tr. 16795; see also Tr. 7241). This would be added expense for a lot owner (Tr. 16796–97). **[173]**

Leonard Steele, Horizon's Vice President for Development (Tr. 13887–88), testified that there was substantial malapi in Paradise Hills (Tr. 14032). In one area owned by Horizon, cluster development was master-planned because of the malapi (Tr. 14033). Malapi interferes with the installation of sewer lines and it requires cutting through the rock, "and that's costly" (Tr. 14034).

The arroyos, mounds or knolls, and malapi may prevent some lots from being developed. It is concluded that some lots and portions of lots may have to be sacrificed in the development process in the future. Further, the expense of developing some lots may be somewhat greater than what would be considered normal, because of arroyos, malapi and mounds. Under these circumstances, the lots are not "fully usable" as the term is generally understood by customers who have not been informed of the building impediments.

T. Celebrity Endorsements

87. Count XI of the complaint alleges that Horizon utilized certain well-known personalities, specifically Merv Griffin and Leif Erickson, to make statements and representations concerning the values, marketability and liquidity of land, the population growth of the Southwest, land as an investment, and their ownership of Horizon land. It is alleged that, directly or by implication, the aforesaid personalities have represented that they purchased Horizon's land because it was a good investment. In truth and in fact, it is alleged, the aforesaid personalities were paid substantial sums of money to make the statements and representations and were given land by Horizon, making the statements and representations deceptive and unfair.

Numerous references have been made to the film scripts of the Merv Griffin and Leif Erickson movies. These movies were widely used by Horizon sales representatives at dinner party sales presentations and at in-home sales presentations. The film scripts make numerous representations about the desirability of Horizon's properties as an investment (CX 526, 527). The Leif Erickson film has the following statement:

> I own some Horizon lands, along with more than 100,000 others, because I am convinced that to buy land in the right place at the right time is a wise and rewarding thing to do (CX 526T).

The Merv Griffin film has this statement:

> I own Horizon land, along with 70,000 other investors because there **[174]**is no other investment as good as land and the Horizon Corporation convinced me that, to buy land in the right place at the right time is a wise and profitable thing to do . . . The Horizon Corporation's developments *are* in the right place and when buying land, *now* is always the right time . . .
>
> Let me tell you of the final deciding factor in my land ownership . . . A Horizon representative explained some very interesting facts about land values to me . . . He showed me charts . . . just as he will you . . . based on Federal Housing Administration figures, which demonstrate how amazingly the market price of land on which new houses are built has increased in recent years (CX 527Z–19–20).

CX 539 is a brochure which depicts Merv Griffin and describes him as "one of our most famous Horizon landowners." Portions of the above statement in the film were reprinted in the brochure.

Leif Erickson's contract with Horizon reads in part:

> 4. Horizon agrees to pay Artist for all services to be performed pursuant to this Agreement the sum of Twenty-five Thousand ($25,000.00) Dollars, together with land priced in Horizon's usual course of business at Fifteen Thousand ($15,000.00) Dollars

(the location of said land or lots shall be mutually agreed upon), which sum shall be paid and land deeded upon completion of services by Artist (CX 318A).

No evidence was introduced as to Horizon's contractual arrangement with Merv Griffin.

The record contains documents which indicate that Horizon land was deeded to Leif Erickson (CX 321–23) and to Merv Griffin (CX324–27). It is also observed that the Agreements for Deed have the words "FREE LOT" written on them (CX 321B, C, E, 323C, 327A, C).

It is not possible to determine from the record evidence whether the cash payment to Leif Erickson represented **[175]**his usual or customary charge for the services rendered with the land being given to him without charge, or whether Mr. Erickson actually considered the Horizon land as part payment for his services. The word "free" on the deeds could mean that no cash money exchanged hands, or it could mean that lots were given "free" to the celebrities. No testimony was presented to clarify what is an obvious ambiguity. Therefore, no determination can be made with respect to the land which Leif Erickson and Merv Griffin received as to whether it was given "free," or as part payment for services rendered.

U. Representations Concerning Whispering Ranch

88. Whispering Ranch property was sold by Horizon as undeveloped property; the remaining properties were sold as predeveloped property. There were several representations concerning Whispering Ranch property which relate solely to that property.

Allocation of lots for sale in Whispering Ranch ended about the end of 1970. Thereafter, sales of Whispering Ranch were very few (Tr. 2044, 1967). The property was opened up and sold out in a very few years; it was Horizon's best seller (Tr. 1964). Remaining sales in later years were trades or cancellations (Tr. 1968).

Whispering Ranch was sold on the basis that the main growth of Phoenix was proceeding out toward Whispering Ranch and that there was a very limited supply of private land in Arizona (Tr. 1970, 16467, 4867, 6179, 6185, 6476–77; CX 486).

Brochures describing Whispering Ranch refer to the growth of Arizona and the Phoenix area. The brochures stress that only 15 percent of Arizona land is available for private development—federal, state and Indian land account for the balance of the land (CX 486).

CX 486, a Whispering Ranch brochure, states:

Phoenix metropolitan population has almost tripled since 1950 . . . and it is growing directly toward Whispering Ranch.

This brochure states that Whispering Ranch is located in the heart of America's most popular dude ranch country. It also speaks of "The sound good sense of investing in Whispering Ranch parcels." Owners of Whispering Ranch property can "sell the land in full, hold all of it for personal use, or subdivide it into smaller lots, whichever they prefer . . . whichever may provide more profit." The brochure describes Whispering Ranch as "5-acre investment parcels, 35 miles Northwest of Phoenix, Arizona." "Rarely, in an investor's experience, does an opportunity so obvious, exceptional and prudent present itself." **[176]**

CX 448, a question and answer bulletin about Whispering Ranch, was used from 1968 through 1971 (Tr. 1965–67). This document depicts and refers to land adjoining Whispering Ranch owned by the U.S. Steel pension fund. It also refers to property owned and being developed by Goodyear Tire and Rubber and the Del Webb Corporation. The document states that if the "big boys" can make profits from land investment "why not you."

Burt Rosenthal, employed by Horizon from July 1972 in Chicago and from July 1973 until 1975 in Phoenix, as a sales representative and sales manager, testified that he sold mostly Whispering Ranch property. He represented Whispering Ranch to be in a "very, very, good, desirable location in relation to the metropolitan Phoenix area and Sun City" (Tr. 3508). He also explained the property visit to Whispering Ranch, which was usually by airplane in a prearranged flight pattern to show off the property best in relation to Phoenix and Sun City (Tr. 3514–16; see also Finding 67). Mr. Rosenthal made representations that Knotts Berry Farm, an amusement-type company in California, was negotiating to establish an amusement center near Whispering Ranch. A Knotts Berry Farm was never established (Tr. 3519–20). Reference to U.S. Steel's ownership of property adjacent to Whispering Ranch was also part of his sales presentation (Tr. 3521). David Roth, a sales representative and sales manager employed in the Phoenix office, also used references to Knotts Berry Farm and U.S. Steel in his sales presentations of Whispering Ranch property (Tr. 3729–30). Customers testified that they were told about land owned by Goodyear and U.S. Steel nearby Whispering Ranch (Tr. 1291–93).

John Mossman purchased a Whispering Ranch lot after he was advised by the sales representative that Horizon was going to develop it just like its other planned communities and that Mr. Mossman could divide the parcel into 20 quarter acre lots (Tr. 4862,

4876; see also Finding 70). Helen Anderson was told she could divide her Whispering Ranch property into lots and make more on her investment (Tr. 6216–17). Helen Anderson was also told by the sales representative that Whispering Ranch would be comparable to Sun City in the future (Tr. 6182). Nancy Tweedy was lead to believe by the sales representative that Whispering Ranch would be like a suburb of Chicago (Tr. 6547).

III. Horizon's Internal Surveys Of Its Sales Offices

89. Commencing in 1973 Horizon began a program of surveying various sales offices. This program, which continued into 1975, included a review of office records, interviews with customers conducted by two employees of the Customer Service Department, Bruce Lehmann and Webb Parker, and shopper's reports of sales representatives' sales presentations made by agents of Pinkerton's, Inc. Documentary evidence of the surveys is in the record as CX 927–955. These documents were not produced in response to complaint counsel's subpoena *duces tecum* on the claim of privilege, based on the "self-evaluative" nature of the documents. This claim was denied by the administrative law **[177]**judge, the Commission (Order Affirming Administrative Law Judge's Order Ruling On Respondent's Claim of Privilege For Certain Internal Corporate Records, dated October 5, 1976), and finally, the United States Court of Appeals for the District of Columbia (No. 77–1385, Feb. 28, 1978). Complaint counsel obtained the documents after completion of the case-in-chief and they were received in evidence during rebuttal hearings (Tr. 16395–16415). The documents corroborate the sales practices previously set forth in this decision, and are summarized hereinafter.

90. In July of 1974 Richard Lovinger, Horizon's Vice President for Customer Service, asked the question: "do our customers read the brochure 'Principles of Land Ownership' upon receipt in the Important Documents package and if not, why not?" (CX 945A). The answer from Messrs. Lehmann and Parker was:

> The vast majority of Horizon customers (perhaps 90%) do not read 'Principles of Land Ownership'. We have determined that our customers reflect the spirit of modern American, that of simply being too busy to devote a great deal of time to daily mail. Though all glance at the Important Documents package, few read the material within, especially promotional appearing literature. The Agreement for Deed receives greatest attention. The remaining material is quickly reviewed, at best (CX 945A).

* * * * * * *

The main point is that as the statement is issued today, it does not attract attention nor reflect any importance to the customer at a glance (CX 945A).

Denver, Colorado

91. The Denver office was surveyed in mid-1974 (CX 927). The survey reported that sales representatives engaged in misrepresentation. Interviews with seventeen out of nineteen customers of sales representative Carl Gustafson revealed reloading situations. Based on Mr. Gustafson's representations, these customers traded property to increase the possibility of making more money with multi-family property and "possibly" to realize a profit in a shorter period of time through improvement of location (CX 927F). This sales representative used representations of satellite development and possible approval of a military highway through Horizon's property as sales aids (CX 927G).

Olin Hillman and Paul Boman sold reloads to older persons who fully expected to receive an economic return on their investment during their retirement years. These customers were traded into multi-family property and moved closer to the development area. "While the customer is never told directly the exact number of years to hold their property, the inferences and omissions cause them to be sold on a short-term basis" (CX 927H–I). [178]

The Denver survey also reported on sales practices during the years prior to 1974, which revealed serious misrepresentations concerning the number of years a customer must hold the property before it could be sold at a profit. The report reads:

A short summary of most repeated years for time to profitable liquidity would be as follows:

CONFIRMATION DATE	
1968 - 1970	Very short projections: Four years maximum on all locations in Rio Grande Estates and Rio del Oro
1971	Dinner Party and District Office gave 3 - 5 year projections on Rio del Oro property close to development area and 5 - 7 year projections for property far from development area
1972	Maximum 8 year projections heard most frequently for Rio del Oro. Shorter projections closer to development area

1973	Maximum 10 years projections heard most frequently for Rio del Oro. Shorter projections closer to development area.

This is obviously a very general statement, but it illustrates the overall experience we encountered (CX 927L–M).

The report summarized an interview with a former sales representative of the Northglen, Colorado office:

Bill Van Sickel (1971 employment) said he was trained by Paul Fenitti to issue 3–5 year profitability projections on Rio del Oro property. Mr. Van Sickle sold 65 contracts (approximately $140,000) on that presentation. . . . Bill Van Sickle said that he was trained in a standard fashion. The other sales representatives he was familiar with during his employment sold land contracts on the same basis. In reviewing Paul Fenitti's sales it appeared as though he practiced exactly as he taught (CX 927M). **[179]**

With regard to resale of the property, the survey had the following to report:

Our resale policy was vague among the majority of the customers. Most customers believe that they will be contacted directly by a purchaser at time of demand. They do not foresee taking positive steps themselves. Horizon's obligation in this function plays a variety of roles but we seldom heard that Horizon Corporation accepted full responsibility for resale of owner's property (CX 927N).

CX 928A–D is a Pinkerton report dated June 20, 1975 on Hal Warren, a former sales manager for Horizon and also one of its witnesses in this proceeding. Among other things, Mr. Warren testified in this proceeding that he had never heard of, much less told, customers about a 20 percent annual appreciation in land (Tr. 11401–02). He also testified that he automatically gave people property reports if they asked for them (Tr. 11403–05). The Pinkerton report of June 20, 1975 disputes Mr. Warren on both of these points:

He asked what I expected from my type of profit, in five to ten years. He laughed and explained that his company did not guarantee a profit but "it is impossible to lose money on land because land everywhere is going up in value about 20 percent a year."

* * * * * * *

I asked for a HUD report on the property and Warren would not let me have one. "It's not that I don't want you to see it but it is rather involved and I would have to explain it to you. I'll have to do that anyway if you decide to buy the property." . . . I clearly had the impression that Warren was either hiding something from me or wanted to explain the report to me so that he could shape facts to suit his sales presentation (CX928B).

During August 1975, the Denver office was again surveyed. The July 1974 report on the Denver office had found substantial reloading by sales representatives based on representations of making more money in a shorter time period through trades for multi-family property and improvement of location. This office was surveyed again in February 1975 and in August 1975. The August survey clearly indicated that the misrepresentations detailed in the earlier surveys had not been halted:

And, the report of February, 1975 stated the following. . . . After reviewing the results of the February, 1975 survey with Stan Drizin, [180]he agreed that sales to existing customers should be limited to approximately 30% of the number of contracts submitted to Tucson for confirmation. He also agreed that the practice of trading investment real estate for better investment real estate based on highly questionable representations for time to development and location analysis should be stopped.

The August, 1975 survey indicates that none of the above has been accomplished (CX 929C, D).

The August 1975 report listed interviews with five customers who traded property to improve their investment potential (CX 929D, E). These trades were directed by the sales representative based on statements about development trends "which are extremely questionable" (CX 929F).

The July 1974 report on sales representative Carl Gustafson stated that his sales were primarily reloads and that he represented that property trades would possibly make more money for the customers through shorter holding periods and better locations, the possibility of satellite developments and the construction of highways. The August 1975 report concluded:

The above statements made a year ago continue to hold true for Carl Gustafson (CX 929I).

CX 930A–G are Pinkerton reports dated June 27, 1975, on Andy Hancock and Bruce Jarnigan. These sales representatives were reported to be making representations that a Waterwood investment would be profitable in 10 years and be a very liquidable investment in a few years (CX 930C, G). These sales representatives also:

. . . mentioned the successful history of land investment by private individuals, but did not indicate, however, that I could necessarily expect such success if I invested. They mentioned that one person in Denver had bought land 8 years ago for $3,200 which is now selling for $5,900 (CX 930F).

The July 1974 problems in the Denver office were brought to the attention of Bill Cook, Horizon's Vice President for Sales, by Richard

Lovinger, Horizon's Vice President for Customer Service (CX 929G). Yet, in August 1975, the same problems still existed (CX 929F).

Houston-Dallas, Texas

92. CX 932A–G, a survey of customers in the Houston-Dallas area dated August 20, 1974, has the following statements: [181]

The single most important comment that can be made as a result of the survey has been issued to Mr. Richard Lovinger in a memorandum of July 26, 1974. (A copy of the memorandum is attached). "We detect a trend among those customers purchasing Waterwood property primarily for profit potential. *Waterwood is a 10 year investment.*"

The Waterwood customer whose prime reason for purchase is strictly investment views the property as an opportunity which will take no more than 10 years to reach a stage of significant profit appreciation. The property is viewed as "easily" marketable at that time.

. . . The prime danger with the present sales practice is that the customer's concept of the project is limited to a 10 year plan rather than more dynamic concepts of a city developing on the shores of Lake Livingston throughout the remaining years of this century.

Other serious shortcomings were found in the selling of Waterwood:

Some contact has been made with individuals that have used the appreciation trade as a vehicle for eventual trade into Waterwood. They have intentions of carrying their "profit" into their eventual Waterwood purchase. These customers anticipate an "even trade" into their new property, and are generally expecting their payments to remain the same. They are not yet knowledgeable of the M.U.D. and W.I.A. Impounds and the Capital Improvement charges on the Waterwood property. This situation will eventually result in cancellations on customers overburdened by payments or at least some downward supersessions on these accounts. The "appreciation trade to Waterwood" scheme can be viewed as a two-step "reload" program. The first step is an increase in net sales volume when taking advantage of the appreciation trade offer, trading from single family to multi-family or commercial. The second step is additional net sales volume upon trading into Waterwood from the multi-family or commercial property (CX 932F).

Another conclusion found in the survey was that in some cases new Waterwood purchasers were not aware of the capital improvement charge should they wish to build in 10 years. The report commented that "some sales representatives fail to discuss the charge" (CX 932F). A further point raised in the report was that a sales representative in Houston, Emmons Parish, was found to be assuring some of his customers that the Waterwood property could easily be sold at a profit in 4–5 years (CX 932F).

CX 946A–K, dated September 25, 1973, is a survey of 50 customers located in San Antonio, Austin and Houston who purchased Water-

wood property during the early months after Waterwood sales commenced. The report revealed sales misrepresentations similar to those in Dallas: [182]

Some customers indicated that the only way they could purchase Waterwood was through an exchange privilege. That is, they were required to purchase first at Horizon City (for example) in order to have their name placed on a preferred customer list. Once Waterwood opened for sale, the preferred customers would be sold first at the best prices.

* * * * * * *

There seems to be a general feeling brewing that if you're looking for a long-term investment with land, then buy Horizon City, etc. But, if you want something shorter term, then go with Waterwood.

4. Horizon's Current Selling Price for Similar Property

This particular point is explosive. Customers are repeatedly posted on the current selling price of similar property in Waterwood. Categorically, none understood the concept properly. The customer believes this price to reflect a fair local market price for which they might sell their purchase. Customers are led to believe that this is a "price quote" on a local real estate market (CX 946H).

The report also recommended that sales by sales representatives Paul Scott and Lucky Fields be randomly interviewed:

Paul has had numerous problems in the past and Lucky is over-stating profitability potential (CX 946J).

CX 950A–G, dated March 13, 1974, is a survey of customers of the Dallas office. One hundred twelve customers were interviewed either in person or by telephone and adjustments were required in nineteen instances. The introduction to the report noted the "alarmingly high percentage of misrepresentations to customers" (CX 950B). The report stated:

. . . a maximum of $268,400 in sales volume can be cancelled (accomplished and pending cancellations) due to "misrepresentation" by Dallas District sales representatives. This does not, however, reflect accurately the magnitude of the problem. We interviewed $335,741 of sales volume which was "misrepresented." A total of $67,341 was saved after full disclosure of the facts to the customer. Thus, $268,400 represents only misrepresented sales requiring some type of action (CX 950C).

The report covered the sales of Joe Mills, a terminated sales representative: [183]

During a twenty month career with Horizon Corporation (from 2/72 through 9/73) Joe Mills earned $34,400 in personal and override commissions on $613,000 of transmitted land sales contracts.

Total Personal Sales	$512,000
Total Override Sales	$101,000
Grand Total	$613,000

As of this date, only half of the grand total in sales volume remained active (CX 950D). In other words, one-half of Joe Mills' accounts had cancelled by March 1974.

* * * * * * *

Half of Joe Mills' sales volume which we personally contacted was grossly misrepresented.

Joe Mills promised his customers that he would negotiate with contractors the resale of their Horizon property at a profit within two years from date of purchase. He promised extremely high short-term profit returns to his customers.

The story ran consistently among all the misrepresented contracts.

The misrepresentations were not at all vague or obscure. For example, within three minutes of conversation with the Dr. Calley Account - ($27,600), it was very obvious that Joe Mills grossly misrepresented the product. Surely the transmittal of this large contract could have been prevented by one short telephone call by the District Manager to the customer. One might believe because of the frequency of the Mills misrepresentations that responsibility for quality sales was purposefully avoided.

We find it appalling that a Horizon Corporation representative can remain employed for twenty months and throughout the entire time grossly misrepresent and embarrass his employer (CX 950E).

Sales representative Tom Lewis participated in sales with Joe Mills and shared equally in the sales commission. Tom Lewis justified his conduct on the basis Joe Mills did the talking (CX 950G).

Sales representative Jim McGuane was another example of deceptive salesmanship. The record does not indicate that he was terminated. [184]

While interviewing customers sold recently by Jim McGuane, we observed two problems:

1. The use of a large red stamp on plats stating "SPECIAL INVENTORY." (See attached example)
2. The marketing of Horizon properties as a short-term investment (a profitable investment within five years).

In a meeting with the representative and his District Manager, Gil Blackmon, Jim McGuane acknowledged the fact that he uses regularly the Special Inventory stamp. It was requested that the stamp be destroyed.

Jim McGuane admitted that he did not present Horizon property as a long-term investment, as defined in "Principles of Land Ownership", but justified his short-term

expectations on location. Jim McGuane believed that the property he sold to the customers in question will be favorably affected by the southeastern growth of El Paso; and consequently, the property will develop more rapidly than other properties in Horizon City which are truly long-term investments.

We reviewed with Jim McGuane the danger of personal interpretation of growth factors and stressed that the company has established some standard guidelines for his use. Jim McGuane stated that in the future he would closely adhere to the guidelines. It does seem rather odd, however, that this understanding is so late in his Horizon career, March 1974. (CX 950F–G).

Another misrepresentation involved salesperson Norma Goldsobel.

In reviewing the accounts sold recently by Norma Goldsobel, only one problem appeared, Crowson - $24,200. The customer purchased the property as a short-term investment.

In a meeting with Norma Goldsobel, we discussed the presentation of the property to Crowson. She indicated that the property was most definitely presented as a shorter term investment than the corporation guideline required. But, her presentation was justified based on information she received from her District Manager, Lyn Ballard. The information being that the airport proposal near Paradise Hills would become a reality within five years and favorably affect our properties (CX 950I). **[185]**

Another sales representative, Alma Faye McMullen, engaged in abuses during reloading:

Problems were encountered with some of McMullen's accounts. She has a very strong tendency to work reload business almost exclusively. In one case, (Hawkins), the customer was constantly loaded to the point where she was purchasing $31,081 worth of Horizon property and she was *78 years old*! This account was downward superseded by $17,200 to a paid-up property, for equity position. The customer will use the retained property for estate purposes only. She had been expecting to sell some of her property in the near future for a profit. Another customer, (Daniels), was traded into Multi-Family property on the appreciation trade with the intent of again trading into Waterwood. They were later told by Alma Faye that they could only trade for Multi-Family in Waterwood for a price of $10,000 representing a $6,800 increase in their contract. They thought they could trade even across and retain their same monthly payment. They were not told of the W.I.A. and M.U.D. payments that would raise their payments considerably.

It should be noted that the elderly lady, Mrs. Hawkins, received no refund; instead, respondent retained all her payments.

Another situation involved sales representatives Jack Ellison and Ross McCollum. These two representatives participated jointly in a major misrepresentation of $52,100 of Horizon property. The customer was told that his down payment on the contracts would be put into "escrow". Mr. Ellison and Mr. McCollum were to sell a substantial amount of the customer's real estate including his home in Tyler, Texas and properties in Florida. The proceeds from the property

would establish a trust fund to maintain the monthly payments on the Horizon property. The representatives immediately transmitted the contract. When the customer received the 30 and 60 day delinquent notices, he was told by Jack Ellison that extensions had been obtained on his "purchase option" and to disregard the notices.

It appears that these representatives intentionally lied to the customer to obtain the front-money on the sale. They had no hope of the contract remaining in force. The 30 and 60 day "extensions" only put off the problem for a short time. This apparent misrepresentation should have been readily identified by the district manager and front-money should not have been paid until the sale had been thoroughly reviewed and accepted as valid (CX 950J).

Customers of sales representative Rita Roy were sold on the basis that their property was a five to seven year investment (CX 960K).

The report on the Dallas Office concluded:

> Discrepancies in sales practices as noted in this report have been discussed with Ted Stone, Zone Manager Southwestern Zone and **[186]**Blackmon, Dallas District Manager. The fact still remains that a number of contracts were allowed to be processed on sales that were not made in compliance with corporate policy. The misrepresentations were readily identifiable through very brief discussions with the customers. Many of the problem sales were in excess of $25,000. The question that has not as yet been answered is why these sales were not checked by district or zone, and why front-money was paid on the contracts before the customers had been contracted. The terms of the sale should have been discussed to check for misunderstanding or misrepresentation (CX 950Q).

Phoenix, Arizona

93. CX 935A–C, dated December 20, 1974, is a report of interviews of 45 customers in the Phoenix area. As stated by the report, five elderly people, ages 62 to 68, "were not fully aware" of the longterm nature of their real estate purchase. They had purchased Horizon property as an investment opportunity for personal gain. The report goes on to state:

> Though the customers were not "misrepresented" per se, we view the presentation of the property as marginal and expressed this opinion to the District Manager (CX 935C).

The report also referenced seven interviews where the customer did not fully understand the Horizon guarantee. The customers apparently understood the guarantee to be "unconditional" (CX 935C).

CX 940A–B and 941A–F concern Pinkerton reports on sales representatives in the Phoenix office during early 1975. Bill Cook, Horizon's Vice President of Sales, requested a full report on the sales practices in the Phoenix office. The end result was that all the sales

representatives who were criticized by the reports resigned (CX 941F). Five of the reports concerned Burt Rosenthal, who testified in this proceeding as a witness for complaint counsel (Tr. 3498–3559). The District Manager observed the following about Burt Rosenthal in the reports:

The most damaging and obviously continual and most flagrant accusations that could be made by me concerning Burt Rosenthal are that he was obviously involved in a land investment presentation comparing stocks, bonds, real estate, etc., and compared Horizon property with past performance of land in the Southwest and that he demanded that the customer act "now" before the land went up in price; . . . (CX 941P). [187]

CX 942A–D is a Pinkerton's report on sales representative Harry Carraway. The report stated that he was making statements that real estate in the Southwest is going up 20 percent per year, and secondly, that the 4 lots he was attempting to sell at a cost of $16,000 would probably be worth $100,000 in due course. The impression that he left was that the property would mature in 8 to 10 years (CX 942A).

CX 939A–B revealed another twist on reloading. The two-page document is an August 7, 1975 memorandum from Bruce Lehmann to Richard Lovinger concerning Phoenix sales representative Harvey Kramer. Mr. Kramer traded three customers from Whispering Ranch to Tierra Grande in the following fashion subsequent to April 1975:

The trade was induced by negatively representing Whispering Ranch and encouraging the purchase of "better" investment properties in Tierra Grande.

Smiley told me that Kramer said, "it (Whispering Ranch) had not progressed as we thought." Kramer told the customer that Horizon Corporation was contacting the owners of Whispering Ranch to offer them another alternative. The offer which Kramer was prepared to make was Tierra Grande which involved an increase in purchase price.

Thompson said, "because of the bad publicity, Horizon gave me an opportunity to get rid of my Whispering Ranch." Thompson viewed the trade as a "special deal" because we had done a disservice to our customers.

Basset said, "the Tierra Grande property was a special offer for JUST Whispering Ranch customers who were dissatisfied with their purchase because of the bad publicity." Basset interpreted the selling price of $12,600 for the Tierra Grande property as a "special price". The property was discounted for unhappy customers. Actually, it was not (CX 939B, C).

Las Vegas, Nevada

94. CX 936A–D, dated December 20, 1974, is a survey of the Las

Vegas office. Four instances of deception are discussed. However, instead of refunding all the money obtained through the deception, substantial amounts were retained by Horizon. The four instances are: [188]

a. Savino Cavender, volume of $25,200 downward superseded to $10,200 (equity position). Sold by Engle and Goretski. Customers were two years from retirement and told sales representatives "I need something that will turn over before I retire." Also both he and his wife had cancer malignancies and payments were becoming difficult with medical bills.

b. William C. Eubank, volume $12,800 reduced $2,500 to $10,600. Misrepresentation in that they were told by salesman (Hal Davis) that Paradise Hills Knolls property was deed restricted to larger homes than was actually the case. Also other salesmen told them "before you pay off the property, you'll make money." Retained balance of property with full understanding of the policy statement.

c. San Ho Kim . . . $19,500 account reduced by $6,500 to $13,000 with retained property now in compliance with policy statement. Promised by old sales representative (Jack Huston) that it would be sold by the company at a profit in two (2) years.

d. Donald McCullan . . ., $800 lot cancelled with refund of equity less commissions paid (approximately $350 refund). Customer was under the influence of alcohol and drugs when he came in the office. Unemployed, refused to make any further payments because salesman (Jack Huston) told him he could get some money out of his investment at any time. Difficult to communicate with this customer but misleading representations were in evidence, therefore, partial refund was made (CX 936B, C).

The survey also uncovered sales during 1971–73 which indicated there would be resale or repurchase of the property by Horizon. These situations are not itemized, nor is there any indication refunds were recommended (CX 936C).

Washington, D. C. - Maryland

95. CX 938A–H is a survey of the Washington, D.C., and Riverdale, Maryland offices dated May 21, 1975. Bruce Lehmann recognized certain distinctions between "gross misrepresentations" and implications, and he apparently condoned misleading and deceptive implications. He concluded as to the Washington, D.C. office: [189]

As a general summary statement, the results of the survey were reasonable. In conversation with the individual customers, I discovered no instances of direct "gross misrepresentation." The customers were given no written or oral, personal or corporate, promises or guarantees, per se, on any topic of presentation. Indeed, in my experience nationally, I find sales presentations seldom involve such direct statements. However, when one's consideration moves beyond direct statements to the realm of "implications", the analysis and evaluation of the sales presentation become far more complicated. Washington, D.C. sales presentations do involve questionable

implications or assurances on such topics as risk, appreciation, marketability or liquidity, time to development or term of investment and quality of investment. I have learned to live with such innuendos believing they are impossible to avoid in the nature of our business. "Reasonableness is my guideline." No adjustments were made to customer accounts (CX 938C).

In the Riverdale, Maryland office, Mr. Lehmann found the same situation prevailing. He stated:

As an overall statement, the general comments in reference to the Washington, D.C. office is valid. The delicate spectrum from "Gross Misrepresentation" to "Implication" is valid. No direct misrepresentations appeared through conversation with the customers; however, implications are very much a part of the sales presentations (CX 938F).

The report on the two offices revealed that customers were trading property on the recommendation of the sales representative that the new location is a "better investment." Mr. Lehmann stated: "It seems to me highly unlikely that a sales representative is qualified to issue such investment advice" (CX 938D). As to the Riverdale office, Mr. Lehmann observed:

The critical elements of *any* investment purchase, such as liquidity, risk, term, quality and appreciation are presented by our commissioned representatives in a favorable light conducive to purchase (CX 938G).

Mr. Lehmann also stated that the sales representatives were distorting the "Principles of Land Ownership." The sales representatives use "10 years or longer" instead of "more than 20 years." **[190]**

Seattle, Washington

96. During March-May, 1974, Messrs. Lehmann and Parker spent ten weeks in Seattle contacting 265 Horizon customers representing $1,500,000 in sales (CX 944A–Y). Their report stated: "It was necessary, primarily due to misrepresentation, to cancel or supersede 80 of the customers contacted, the sales value of the reductions being approximately $500,000" (CX 944C). Horizon distributed nine hundred and eighty-three (983) questionnaires to customers and received a 27 percent response. The questionnaire (CX 944H–L) covered a multitude of topics, but was essentially aimed at ascertaining the type and degree of misrepresentations used to sell lots in the State of Washington. One question asked of customers was:

What were your reasons for buying this property?:

Over 40 customers checked "short-term investment" which automatically necessi-

tated a customer service contact. In conversation with these customers, the vast majority of them were sold on the basis of development (roads, utilities, houses and commercial facilities) touching their property in the short term (as defined by Mr. Nelson in the "Principles of Land Ownership"). And that the property could consequently be sold easily to a demand market at a sizable profit. Indeed, the standard "dinner party presentation" was heard repeatedly. The area would be developed and their property ready for sale at a profit to a demand market in 5 to 7 years, no longer (CX 944E).

The report also stated that of 186 "problem" customers, 126 required no adjustment:

In many cases misrepresentation may have been present, but after full disclosure of Horizon policies, the customer elected to continue the contract rather than request a refund (CX 944F).

The summary of the report is as follows:

The difficulties we have experienced in the State of Washington are by no means resolved. Indeed, we have just begun to understand the magnitude of the problem. **[191]**

"Misrepresentation" was not limited to a special group of a few salesmen nor to a particular time span. It appears as though new hire sales representatives were intentionally trained from the start of their careers to misrepresent Horizon properties. The standard dinner party presentation itself was extremely over-optimistic in its projections if not directly in violation of Horizon policy. The past "sales standards" of the Washington offices seem seriously deficient, especially in terms of sales to older individuals of retirement age.

The response to the mailing of approximately 1000 questionnaires was 27%. The reduction in sales volume was $300,000 (questionnaires only). One need only extrapolate these figures to view the dimensions of the problem (CX 944Y).

Des Moines, Iowa

97. CX 947A–U is a survey of customers in Des Moines dated November 1, 1973. This survey was prompted by ten customer complaints to the Attorney General of Iowa. Of 111 customers interviewed, 22 were adjusted. Appendix A of CX 947 lists the various reasons the contracts were cancelled or reduced. For example, an account for a person named Graham with three contracts totalling $26,550 was "Downward Superseded to $9,100. Misrepresented short term sale income in 5–7 years" (RX 947L). There is no explanation why only a portion of the account was cancelled. Other accounts where downward corrections were made indicate the property was misrepresented in various ways; single family sold as commercial, promised resale, promised resale and told

university was under construction, income in 6 years from apartments, short term development indicated, etc.

Customers (approximately 50 percent of the sample) complained of excessive reloading attempts being made by local sales representatives:

These attempts were generally made under the pretext of updating on the progress of the communities, when in fact, the representatives were not well informed on the number of houses, industry, etc. Our requests for appointments for customer service visits were sometimes denied due to previous "Customer Service" visits that were actually resale attempts (CX 947J). **[192]**

The report observed about the Des Moines office:

To date, we cannot determine any reason or logic as to the representative's method of operation. *There is no consistent pattern.* We can say only if the representative was not making progress towards the purchase through the use of standard presentation, then the presentation was altered to make the sale (CX 947H).

St. Paul, Minnesota

98. CX 948A–L is a survey made of the St. Paul office dated January 2, 1974. Bruce Lehmann spoke with 40 customers and found what he considered six "problems" (CX 948E):

Listed below are the details of the six problem accounts:

1. KNOEBEL $8,600.00 - Sold by JORDAN - EVANS

The customer was told that in ten years the two $4,300.00 lots would appreciate from $8,600.00 to $60,000.00. Attached is the sales representative's pencil work.

2. SORENSEN $1,600.00 - Sold by JORDAN - EVANS

Customer told that Unit 50, Rio del Oro, would develop within two years and that Unit 50, Rio del Oro, is sold only to present customers because of its short term nature.

3. STATZ $3,000.00 - Sold by JORDAN - EVANS

Customer told their property in Rio del Oro, Unit 51, would be developed within five to eight years. The customer believed that the purchase is a short term proposition.

4. GRIMMELL $3,600.00 - Sold by GABE

Customer is investing in Canyon del Rio for retirement potential. Representative stated that building is moving rapidly and should reach Canyon del Rio within five to six years. **[193]**

5. WATERMAN $10,000.00 - Sold by JORDAN - EVANS

Customer told that a shopping center was going to be built on his property in 18 months. I took the representatives making the statement to a second meeting with

customer and had them correct the presentation. It was corrected and the customer has agreed to view the property and make a final decision.

6. PETERSON $12,100.00 - Sold by JORDAN - GABE

Customer expressed extreme discontent with his representative JORDAN. Ken Ewing will visit the customer and research the details of the problem. Also customer has short expectation for appreciation of property.

Vancouver, Canada

99. CX 949A–J is a survey of customers in Vancouver, Canada and Salt Lake City, Utah, dated February 8, 1974.

The Chinese market was emphasized in the Vancouver sample. Of the 26 accounts, 15 were samples of the Chinese customers. Even though language difficulties were encountered, several problems were found to be evident in this market.

1. Almost all of the Chinese customers were not aware of the long term nature of their land purchase with the company. The bladed road in 8 years was construed as a time when the property would be in a saleable state. When the policy statement was reviewed with them, they were quite disappointed with the possibility of waiting 15 to 20 years or more for maturing of their property.

2. The right of rescission is not being handled according to policy. In one case (Pui Tak Lee #378–54318) the customer called the sales representative the next morning asking to cancel his purchase. He was told "that isn't possible as the check and papers have already been sent to Tucson for processing." . . .

3. Some customers expressed hopes that owning property in the United States would give them some advantage in immigration **[194]**proceedings. In all cases it was explained to them that Horizon Corporation makes no promises of assistance in immigration applications, and that all decisions on immigration are entirely dependent upon determinations of eligibility made by the United States Immigration Service.[5]

* * * * * * *

The remainder of the sample consisted of the Indian and Candian customers. In some cases the Indian customers were also surprised by the possibility of their property taking more than 10 years to mature. . . . (CX 949D–E).

Chicago, Illinois

100. CX 951A–J is a survey of Chicago customers dated August 20, 1974. Seventy customers were interviewed and twenty-three of twenty-eight listed salespeople were reviewed. A general statement of the results are contained in the following paragraphs:

The Chicago office is not selling a long term asset. What is being sold is a short-term

[5] This statement does not make it clear whether the "explanation" was by the sales representatives at the time of the initial sale, or was by the surveyors.

investment opportunity ranging from 4 to 12 years to maturity depending on property type and location.

Throughout the entire survey only three customers referred to their purchase of property as a long term investment with personal intentions of holding the property for 15 to 20 years or longer before reselling to a demand market.

In not one case did we see evidence of the Principles of Land Ownership being used in the sale presentation. Though customers receive the statement in the customer package, as indicated in a memorandum to Richard Lovinger, few customers have read it upon receipt. Indeed, the policy statement may be avoided purposefully as it contradicts present sale presentations.

The Chicago office has a repeated tendency to trade owners of Horizon property to "Better" property. The trade to "Better" property involves a net sale. The Chicago office customers indicate that the sales representatives assured them that the property was "Better." It would develop sooner and at a greater rate. Such trades involve movement in some fashion towards the **[195]**immediate development area. We refer to 16 customer interviews. This tendency is not unique to Chicago. Our experience across the country has taught us that *TRADES* are often highly questionable contracts in general.

Several synopses highlight the findings of sales practices in Chicago:

Charles Kann and Larry Kaghan

These sales representatives work frequently as a team. In no instances did we find the use of the "Principles of Land Ownership" physically nor in intent. These gentlemen do not sell a long term asset and frequently trade Horizon property owners to "Better" property.

Stanley Lieberman

Mr. Lieberman has a tendency to encourage short projections in the minds of fly-in customers. In almost all cases, additional sales are made on fly-ins where customers are disappointed in their "far-out" property, and they are then sold a "closer-in" more expensive piece of property. This trade-in is usually interpreted by the customers as a much shorter term investment. They expect returns on their property in as little as 4–5 years. In one instance a customer (Garrison) stated that he was told specifically that building would be going on in 4 years on their property (Horizon View Estates). In fact an on-site presentation was overheard by Webb Parker where an improved lot at Waterwood was presented on the basis of "You can sell it in one year at a profit, so why worry." Strong surveillance of current sales should be conducted on the representative, and reprimands with retraining instituted immediately (CX 951G, H).

Marshall Kerman

As in other cases in Chicago, Mr.Kerman needs to give more emphasis on the long-term nature of our properties. In a discussion with this representative he stated "If we have to tell the people that this is a 20 year or more investment we would not make a sale." (CX 951I). **[196]**

The Chicago survey report, dated August 20, 1974 stated in its summary:

The Chicago office suffers from one problem. The sales representatives (especially those with longevity) are reluctant to accept the long-term nature of our product (CX 951J).

In June of 1975 Bill Cook sent Tony Federico of Horizon's Chicago office the following message concerning a veteran salesman, Ray Schwartz:

Enclosed is a shopper's report we received on a sales presentation made by Ray Schwartz in Cleveland. There is evidence of serious misrepresentation in certain of the statements made by Mr. Schwartz. Tony, there is no reason for this type of sales presentation by an experienced representative like Ray Schwartz. The discussion of a specific time period (8 years) and an approximate final selling price ($12,000) is inexcusable (CX 954).

Additionally, the shopper's report contained the following "locked-in growth" presentation by Mr. Schwartz about Rio Communities:

He explained the growth of Albuquerque could only grow South. To the North is rough terrain. Mr. Schwartz stated that mountains were located to the East. Just South of Albuquerque is a small portion of an Indian reservation which would make Valencia (the area which we would buy in) just a thirty (30) minute drive to Albuquerque. The Western area also has an Indian reservation (CX 955B). **[197]**

IV. Investment Quality of Horizon's Properties

A. Complaint Counsel's Expert Witnesses

(1) *Testimony of Professor Howard Stevenson*

101. Dr. Howard Stevenson, an Associate Professor at the Harvard University School of Business Administration, testified as an expert witness for complaint counsel. At the time of his testimony Professor Stevenson's assignment at Harvard was the general management area; he taught three courses, real property asset management, real property asset development, and field studies in real property. With the exception of a brief leave of absence, Professor Stevenson has been continuously employed as a professor at Harvard since 1966 (Tr. 6571–74). He holds Doctorate and Master's Degrees from the Harvard Business School. His Doctorate focused on business policy and long-range planning, and his Master's, which he received with high distinction, involved specialization in investment finance.Professor Stevenson received his Bachelor's Degree from Stanford University, with distinction in mathematics (Tr. 6575).

Professor Stevenson is a trustee of a successful real estate investment trust, a director of a company which invests long-term pension accounts in the United States realty market, a Director of a company whose activities include building and development, and a trustee of a non-profit charitable organization whose primary purpose is acquisition and development of raw land which is deemed to be of a critical conservation interest (Tr. 6576–77). Professor Stevenson has been involved in a variety of studies for government and others (Tr. 6577). He has had experience of various types in dealing with real estate and other investments, including work with major corporations regarding their involvement in real estate as investors and users (Tr. 6574, 6577–78).

Professor Stevenson has examined large properties in the Southwestern United States, including Texas. He did a study of Woodlands, a 17,000 acre property north of Houston, Texas, and a study of a 7,000 acre recreational land development in East Texas (Tr. 6578–80). He is a member of various professional organizations (Tr. 6581), and has written numerous articles and a book on real estate investments and other aspects of real estate. He has worked on feasibility studies and the economics of high-rise buildings (Tr. 6582). Professor Stevenson is also a limited partner in a 160-acre development project near Castle Ridge, Colorado, which is selling 10-acre tracts of land with utilities (Tr. 6661–66, 6886–6896).

Professor Stevenson stated that there are three fundamental factors to be considered in a real estate investment; the property itself, the financial return or investment structure, and the people who are involved as investors, managers and active partners. In terms of investment philosophy, one must seek an investment where all three factors work together; an investment lacking in any one dimension should be rejected (Tr. 6585, 6814–15). He observed that there are more investment opportunities than money; therefore, an investor should be very selective in committing capital to any particular investment. An investor must seek a means of evaluating investments whereby he can quickly reject a large number, make intensive study of a few more, and do an extremely intensive study of those investments where he intends **[198]**to place funds (Tr. 6585–86). An investor must know the risks and the potential rewards of an investment (Tr. 6587).

Professor Stevenson stated:

I fundamentally believe that your sound investment value must ultimately be related to use, which is basically a retail end user use. I think this is true in the stock market where you see many of the promotions that had no fundamental end market for their

product, got burned. This has been true in real estate. You can ride bubbles, you can ride dreams, but fundamentally it is end use that creates value (Tr. 6587).

According to Professor Stevenson, an absorption analysis is basically an assessment of the rate at which properties will be placed into an end use (Tr. 6589). The sophistication of absorption analysis varies greatly; the further away the use, the more complex the problem becomes and the more end data must be developed (Tr. 6590). Professor Stevenson emphasized that an investment can be rejected without the necessity of a sophisticated study.

There are a variety of reasons for rejecting an investment. One can be simply the relationship between market demand and the available supply. One must also reject it because of physical conditions, either known physical deficiencies or uncertainty with respect to physical conditions. One might reject it for a variety of legal uncertainties relating to title or zoning or various property interests which may be involved, such as water rights, mineral rights, etc. Also uncertainty as to precisely what legal rights you obtained relating to contract for deed versus deeded property—all of these things and they may be risks that overwhelm any of the other factors:

Organizational problems, when you examine an investment and ask yourself, does the organization which has the capability or has the responsibility for carrying out the investment have the capability. And all of these are reasons where any one of them is sufficient to reject, because ultimately for a successful investment you have to have the right market, the right balance between supply and demand, right physical condition, the right organization and proper legal protection.

So if I have determined that any one of the others has sufficient risk in it to eliminate the investment possibilities of the investment, then I don't need to do a sophisticated absorption study (Tr. 6591–92).

Professor Stevenson stated that representations that land is risk free, or "the nearest to a sure thing," are, without qualification, false. Factors such as price, eventual utilization, changes in legal constraints, the volatility of the real estate market, must be used to qualify such a broad representation (Tr. 6778). [D. A. Lomax, an expert witness who testified for Horizon, stated that "all property does not go up uniformly" (Tr. 15128)]. Professor Stevenson also testified that unimproved land probably should be purchased only when change in use is imminent and when **[199]**the conditions surrounding that change can be examined and verified (Tr. 6592, 6883). [Alan Nevin, an expert witness who testified for Horizon, recognized that the increase in raw land price comes when a change in use is imminent and can be predicted, usually a five to seven year

basis (Tr. 16066, 15883–84)]. Professor Stevenson noted that there is increasing recognition of the difficulties of putting together an organization capable of carrying out large scale projects and of bringing them to a successful conclusion (Tr. 6594).

Putting aside risk factors, Professor Stevenson testified that the investment quality of Horizon's lots depends upon (1) the absorption rate, (2) the price paid originally, (3) the future costs of any development expenses to be incurred by the owner, and (4) the cost of carrying the property in the meantime (Tr. 6880–81). Another factor to keep in mind is liquidity. Liquidity, with respect to investment in general, is the ability to turn your asset from a noncash form to a cash form. Undeveloped land, except where there is an immediate use for it, is not very liquid (Tr. 6595).

102. Professor Stevenson's assignment with the Commission was to analyze the investment value and risks, not in an appraisal sense, to determine whether the land in Horizon's properties of Paradise Hills, Rio Communities, Arizona Sunsites, Whispering Ranch and Waterwood was a prudent investment given the information available, and to look at the relative value of different lots or parcels within those projects (Tr. 6606–07). He reviewed much of the material in this record. He studied documents from Horizon, property reports, and planning documents. He interviewed brokers and others and personally visited Paradise Hills, Rio Communities and Waterwood. He also visited other properties in the Albuquerque area and in the area near Waterwood (Tr. 6608–29, 6710–13).

In Professor Stevenson's opinion, the lots in Paradise Hills have proved to be at best a marginal/poor investment. He testified that the lots outside of the development area, even within areas close to the development area, have proved to be a bad investment. The areas currently served by water and sewer have a potential for sale. The remaining lots have little, if any, trading activity. The costs of development and difficulties of development offer little hope for long-term investment potential (Tr. 6629–30, 6735–40).

In Professor Stevenson's opinion the vast, vast majority of Rio Communities lots are bad investments. He based this conclusion on an analysis of the market, the uncertainty regarding physical conditions, the capability both financially and organizationally to develop the lots, and what may be prospective legal uncertainties given the time horizon to development (Tr. 6675–76). Professor Stevenson testified:

The problem of going from a population of 600 or 800 houses, . . . to the size of a population that would be required to fill the Rio Communities, has proved to be

difficult at best. It is an exercise which has been carried out over exceedingly long time periods. That requires major financing. (Tr. 6690). [200]

According to Professor Stevenson, the most critical investment factor is the supply and demand relationship (Tr. 6849). He relied on several studies of the supply and demand for undeveloped property in the Albuquerque area, and on his personal investigation (Tr. 6676–79, 6683–88). He named several undeveloped projects in the Albuquerque area and noted in addition that there were large chunks of land not yet subdivided (Tr. 6676). Professor Stevenson testified:

The total of lots available in those sites exceeds the full needs of the community of Albuquerque under the most optimistic projections through—and I have to think back, given what I just included—well beyond the end of the century and depending on which projections you read, perhaps well into the 22nd century (Tr. 6676).

In Rio Communities Professor Stevenson considered the lack of an infrastructure being in place an investment risk (Tr. 6688–93). While there are indications that adequate water is available, Professor Stevenson stated that he is not satisfied without further investigation. He noted the difficulties which Paradise Hills has had with a water supply (Tr. 6690–93). Water and sewerage problems twenty-five years in the future may pose severe problems not now readily apparent (Tr. 6699–6700, 6846–48, 6869–72). Professor Stevenson also foresees risks in the fractionalization of the land. Land divided into small lots with many owners, most of whom are non-resident, raises a question of whether the land can be used effectively at some future date (Tr. 6688–89, 6853). Professor Stevenson noted that if the 1,000 dwellings which had been built in Rio Communities over the past eighteen years, were duplicated each year in the future, it would take 131 years to fill the 131,578 single family lots in Rio Communities (Tr. 6695).

For all the above reasons, the supply and demand situation in the market, the physical condition of the property, the organizational question as to the ability to deliver, and legal uncertainties would make Rio Communities lots bad investments (Tr. 6719, 6748–49). Multi-family property would represent a "very bad" investment because of the higher initial cost of the land and the longer holding period which would be required (Tr. 6719–20, 6749). For these same reasons commercial lots would be even worse investments (Tr. 6720–23, 6749):

The basic objection to all of these lots is founded upon the absorption data, the supply available as recorded in plats and the potential supply which I believe could be brought into existence during the period before the potential absorption. The other

factors . . . are simply additional risks which compound the problem of investment value (Tr. 6750). [201]

Professor Stevenson recommended defaulting and taking a tax loss where there were substantial payments remaining to be made on Rio Communities lots (Tr. 6752–54). He is of the opinion that there are so many fatal flaws with respect to investment in Rio Communities lots that elimination of one-half the risks would not change his opinion of the investment value of the lots (Tr. 6878).

Professor Stevenson rejected Whispering Ranch as an investment property (Tr. 6741). The prospect of a change in use of the land is slight, in Dr. Stevenson's opinion. There is substantial land available in Arizona, and the fractionalized parcels of Whispering Ranch would make development difficult (Tr. 6742). He classed Whispering Ranch as a very bad investment (Tr. 6743, 6756–57).

Professor Stevenson recommended against an investment in a lot in Arizona Sunsites:

. . . primarily on the basis again of the tremendous oversupply of lots and the potential additional supply of lots that has been alluded to very frequently with respect to Rio Communities, but is perhaps even more severe in the case of the remote subdivisions in Arizona. Cochise County in particular has a major oversupply condition according to the studies which I have read (Tr. 6757).

Fractionalization of the property interests and the oversupply of lots are the basic reasons Professor Stevenson rated Arizona Sunsites as a bad investment (Tr. 6758).

Professor Stevenson also recommended against the purchase of lots in Waterwood as investments:

I would have recommended against the purchase of this property for several reasons. One is in terms of the information I was able to gather there were properties available, fully developed, at prices which on a present value basis, were not totally incomparable. These properties, in many cases, had more proximate location to Houston, they had their facilities in place and were in subdivisions or land developments where the potential total number of lots was known and limited. The information which I have on Waterwood showed the platting [of] roughly 7,000 [acres]; however, the presence of the 25,000 acres, most of which was unplatted, provided a great amount of potential competition within the site itself and I believe would [202] effectively serve to limit any up side potential.

Therefore, to recapitulate, I saw a problem of supply and demand, again the same problem but looking at the study of the absorption in the Houston market, one would have to place the potential absorption and use of that lot many decades in the future, obviously depending on specific location and secondly, the unknown of the supply as created by my major competitor, Horizon, and third, in examining other opportunities within the Houston market there seemed to be lots that offered roughly the same up side potential in terms of their price on eventual sale where I would not have to

assume the risk of anybody's ability to perform in the future with respect to construction and development (Tr. 6761–62).

JUDGE BARNES: How does he evaluate the lots as an investment?

THE WITNESS: The finished lots within the development core seemed to me to be roughly comparable to the product which I saw in other subdivisions. Those lots which were dependent for future development would be rated by me as bad because of the comparability of their net present value of pricing to the purchase value which one could have in existing subdivisions. Because of the distance of this project from Houston and my judgment as to whether it would really compete well against other major projects such as Woodlands that themselves were projecting 30 and 40 year build outs with less land (Tr. 6763).

Professor Stevenson attributed little value to the Horizon exchange privilege. He observed that an individual desiring to build in Rio Communities could purchase a lot in the open market or at an auction at a price well below Horizon's price, and exchange that lot into the development area (Tr. 6703–04). Professor Stevenson also stated that there was uncertainty as to whether Horizon would honor the exchange privilege for second, third or on down the line purchasers (Tr. 6704). Professor Stevenson testified that it was his understanding that there were no exchange lots available in Paradise Hills (Tr. 6704–05). This understanding was confirmed by William Kelly, a former Horizon employee and presently a realtor in Paradise Hills, who testified that the exchange privilege had not been honored in Paradise Hills for the past few years. Horizon redesignated lots in the Knolls area, where the exchange privilege could be exercised, to Country Club Estates. Thus, no exchange lots were available and Horizon would not have to honor the exchange privilege. **[203]**

(2) *Testimony of Joseph Lusteck*

103. Joseph Lusteck, a real estate planning consultant, testified for complaint counsel as an expert witness. At the time of his testimony, Mr. Lusteck was President of the Real Estate Division of Wortman and Mann, Inc., a real estate and financial services company located in Jackson, Miss. (Tr. 6928). He has been an employee of Wortman and Mann for the past five years. Prior to that time he had been employed, since 1965, first with the Pima County [Tucson, Arizona] Planning Department and later the Jackson [Mississippi] Planning Board (Tr. 6931–32).

As a real estate planning consultant, Mr. Lusteck provides services relative to land development and project planning. He is concerned

with property project evaluation, impact analyses, environmental, traffic and transportation studies (Tr. 6928). Mr. Lusteck focuses his activities on real estate, whether from a land use or a development point of view (Tr. 6929). He renders these services to a variety of clients in the business community and in the public sector, including cities, towns, counties, and agencies of the federal government (Tr. 6928–29). He has been responsible for working on three of the New Towns for the Department of Housing and Urban Development.

Mr. Lusteck graduated from the University of Arizona with a Bachelor's Degree in Business Administration, majoring in area development. He has a Masters of Science Degree in Urban Planning from the same school and has done some additional graduate work in Public Administration (Tr. 6929). He is a member of the American Institute of Planners (Tr. 6944).

Mr. Lusteck has made studies or evaluations of several large tracts of land. He did two studies for the Federal Trade Commission, one the 91,000 acre Rio Rancho project near Albuquerque, and the 26,000 acre Rotunda project in Florida. In 1973 he did a study of an 8,000 acre project in New Mexico across the state line from El Paso. He did a study of a 1,575 acre project outside Jackson, Mississippi. He has responsibility for planning about 5,000 acres of shoreline development for the Pearl River Valley Water Supply District near Jackson (Tr. 6941–42). He has worked on over 100 feasibility studies since he has been employed by Wortman and Mann (Tr. 6943).

104. Mr. Lusteck's assignment for the Federal Trade Commission was to prepare an evaluation of the Horizon City project, to include an economic and market analysis, a physical evaluation, a review of the master plan, a look at the investment potential of individual lots, and a survey of the resale market (Tr. 6968). A report of this evaluation was rendered in May 1977 (CX 874; Tr. 6969). Mr. Lusteck wrote the majority of the report and reviewed it in its entirety. He designed the study, visited Horizon City three times, talked with people, and visited other development areas in and around El Paso (Tr. 6969). Mr. Lusteck used a thirty-year period for his study—1975–2005. He concluded that the economic and market conditions and outlook for El Paso would not support the absorption of the large number of lots in the Horizon City project within a thirty-year period (Tr. 6982).

Mr. Lusteck made a specific absorption study of the Horizon City project for the thirty-year period to the year 2005. He studied **[204]** indicators of population, households, employment, income, retail trade and service, industrial development and recreation and tourism. He also studied the supply and demand for property and the

price of property in the El Paso area (Tr. 6983–85). He concluded that El Paso will require approximately 195,000 housing units by 2005 [1.5 times the increase in the number of households] (Tr. 7020). This growth will call for a total of about 125,000 acres of land for urban use (Tr. 7020–23, 7042). The City of El Paso and its extra-territorial jurisdiction of five miles beyond the city limits contains approximately 125,000 acres of vacant land (Tr. 7026–27). The Northeast sector surrounding El Paso contains 28 percent of that total, the Northwest sector contains 23 percent and the Southeast sector contains 36 percent of the vacant land (Tr. 7027). The Southeast sector is expected to capture 30 percent of the growth over the next 30 years (Tr. 7032–33, 7154–57, 7167–68).

There is within the City of El Paso and its extraterritorial jurisdiction enough vacant land to accommodate all the projected growth of the area through the year 2005 (Tr. 7043). Mr. Lusteck determined that 2,859 acres of Horizon City will be absorbed by 2005, which he believes will be the maximum possible absorption. This would amount to 3.3 percent of Horizon City's total acreage (Tr. 7039). This acreage is projected to be within El Paso's extraterritorial jurisdiction and would include the present core area and adjoining lands primarily owned by Horizon itself (Tr. 7039–40).

Mr. Lusteck projected a total population capacity for Horizon City of 315,640. He testified that if Horizon City captured all of El Paso's growth until 2005, 98.6 percent of Horizon City would be absorbed. "Obviously no one project is going to do that" (Tr. 7041).

Mr. Lusteck concluded that Horizon City was "grossly excessive," given the market in which it is situated (Tr. 7041):

> Well, I told you that there are certain opportunities for land absorption in this particular geographic area. The problems, the reason that there is a differential there, is that the Horizon project is located outside of the area, or largely located at least outside of the area in which growth could reasonably be expected to occur during this period of time (1975k–2005). The problem is one of scale. The Horizon project is just so large, relative to the size and potential for growth of El Paso, that there is really very little chance within the given time constraint of that land being put into urban use (Tr. 7043).

Mr. Lusteck forsees problems for some lots in Horizon City because of arroyos and a flood plain. Some of the lots might not be buildable (Tr. 7176); there could be construction problems which would detract from the desirability of other lots (Tr. 7047). The lack of an infrastructure and the ultimate expense of acquiring water and utilities could create a substantial financial problem (Tr. 7048–51). Fractionalization of ownership is also viewed as a problem in the future development of the area (Tr. 7051–52, 7213–14). **[205]**

Mr. Lusteck testified that Horizon owns 1,745 acres of land surrounding the present core area of Horizon City, and this land would be the most likely to be developed (Tr. 7057–59).

In a study of the resale market, Mr. Lusteck found 36 possible arms-length sales transactions of deeded Horizon City lots (Tr. 7062). He determined that of about 2,000 listings taken by a real estate broker, Dewitt & Rearick, approximately 45 sales had taken place (Tr. 7062–63). The only lots Dewitt & Rearick would list, at the time of Mr. Lusteck's investigation, were lots near or on a hard surface road, adjacent to the core area, along Horizon Boulevard, or by the lake (Tr. 7063). The records of the El Paso multiple listing service showed 269 listings of Horizon City lots and 16 sales (Tr. 7064). Mr. Lusteck also noted that the Rocky Mountain Land Auction Company offered 450 lots for sale at auction but received no bids (Tr. 7065). The conclusion reached by Mr. Lusteck was that there was a very weak resale market for Horizon City lots (Tr. 7066, 7219).

Mr. Lusteck was very critical of the master plans for the Horizon City project. He observed that the overall development concept appeared to be optimization of the number of lots that could be platted on the available acreage (Tr. 7094, 7135). He stated that there was a physical problem with the generally small size of individual lots, which was inconsistent with the total acreage available. Single family lots are platted three to the acre (Tr. 7169). This small size is particularly a problem in the multi-family and commercial lots, which usually develop in larger tracts (Tr. 7095). A further problem which Mr. Lusteck noted was the unplatted acreage scattered throughout the project. The ultimate use of the unplatted acreage could alter the entire development concept since there is no commitment as to the use of whole sections of land (Tr. 7095).

Mr. Lusteck was of the opinion that Horizon City lots were very poor investments:

> The opportunity for producing a return on an investment in a lot of the outlying portions of Horizon City would be very slim because there is a very small chance of that lot ever being placed in use (Tr. 7078).
>
> * * * * * * *
>
> . . . Making just an investment in one of those lots, it would be a poor choice, because it is not a liquid investment and the chances of taking any appreciation within a reasonable period of time would be very slim. **[206]**
>
> PRESIDING OFFICIAL BARNES: What is a reasonable period of time?
>
> THE WITNESS: I have used 30 years for this analysis. I think you could make a distinction of core area lots. Now, there could be a possibility to do well on a core area lot.

. . . The vast majority, the 97 percent that I don't think are going to have a chance at being absorbed, I would advise them otherwise. Consequently, if I was asked to advise someone, should I invest a hundred dollars in this, I would say no because your chances of selling it are very slim. (Tr. 7079).

(3) *Testimony of Jack Mann*

105. Jack Mann, Vice President of the Board, Wortman and Mann, Inc., Jackson, Mississippi, testified for complaint counsel. He has been with the company since 1949. He was elected Vice President of the company in 1955 and President in 1967. Until 1976, he was Chief Operating Officer of the firm (Tr. 7553–54). He has been engaged in the real estate business for 28 years. More specifically, he has been responsible for appraising real property for clients and counseling with clients regarding their real estate problems. In the general real estate field he has been involved in buying, selling, leasing, financing developing and promoting real estate. For the past 10–15 years the company has been the managing broker of a 10,000 acre tract of land, with the responsibility to plan and supervise the developing and marketing of the land (Tr. 7554–55).

Mr. Mann has a Bachelor of Science Degree in Business Administration from the University of Missouri. He has also taken special courses from the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers. He has been an appraiser since 1947. In the last 27 years he has appraised property of virtually all types in areas including Southeastern and Southwestern United States, New York, Illinois, New Jersey, Nevada and Missouri. He appraised the United States Naval Auxiliary Air Station site in Lauderdale County, Mississippi containing some 10,000 acres. He has also appraised five tracts of land in the Barnett Reservoir site in Mississippi containing between 10,000 and 60,000 acres, a portion of the Okefenokee Swamp in Georgia containing 42,000 acres. He has appraised two of the New Towns developments, and numerous other large developments (Tr. 7557).

Mr. Mann's assignment for the Federal Trade Commission was to determine the prices the Horizon City lots would sell for in the open market at the time of the appraisal (Tr. 7578). His instructions were to ignore the Horizon selling price of the lots (Tr. 7576, 7570–71, 7601). Mr. Mann stated that the conditions implicit in market value are: **[207]**

(1) the buyer and seller must be typically motivated;
(2) both parties must be fully informed or well advised;
(3) a reasonable time must be allowed for the transaction to take place;
(4) payment is made in cash or its equivalent;

(5) financing, if utilized, would be the typical terms being utilized in that particular area; and

(6) the price paid is unaffected by the financing or any other external force (Tr. 7578).

Mr. Mann testified that the beginning point of any appraisal is an estimate of the highest and best use of the land (Tr. 7584):

Highest and best use is one of the basic principles. It is defined as that legal reasonable approximate utilization that results in the greatest net return to the land, legal in the sense that it must not be illegal, reasonable in the sense it must be susceptible of achievement and approximate is simply another word for "near," which simply means it is a use which must occur within the reasonably near future (Tr. 7583).

Mr. Mann identified some of the carrying costs involved in the purchase of vacant land, including the taxes and the loss of interest on the dollar amount used in the purchase of the land (Tr. 7584). A major risk in the purchase of vacant land is that the value will not enhance to a point that there would be a profit made in the event of resale. He testified that a purchaser of undeveloped land:

. . . must, first of all, consider what the utilization of it would be, regardless of whether he plans to utilize it or not, for land to have value it must have some utility or some logical use within a reasonable period of time. Secondly, he must keep in mind that it is typically a nonliquid asset. It normally produces no income. The risks of whether or not it will go up in value which will produce him a profit - whether the present worth of this future dollar that he might receive is sufficient in light of other possible investments that he might make—say in stock, bonds, savings accounts, etc. (Tr. 7590). **[208]**

The federal property report would not provide an individual with sufficient information to make a prudent decision about investing in vacant land. Mr. Mann testified:

The HUD report does a very good job in describing the physical portion of development. It talks about the land itself, and it very candidly described the limitations and it talks about the presence or absence of utilities and the obligation on the part of the developer to provide or not to provide. But the one thing it does not provide is any economic data. It does not, of course, go into absorption, probable absorption, these types of things, and the latter in my opinion is necessary for a good decision for investment purposes (Tr. 7589).

Mr. Mann's individual assignment was to appraise 10 "typical" lots in Horizon City (Tr. 7592). For this assignment he used the direct market comparison approach, in which sale of properties similar to the ones being appraised are identified, accumulated, analyzed, adjustments made for any possible dissimilarities between the properties that sold and the property being appraised, and by comparing these actual transactions with the property being ap-

praised an opinion as to the value of the property is determined (Tr. 7595).

Mr. Mann prepared an appraisal of 10 lots in Horizon City (CX 892). He found no evidence the exchange privilege had an effect on the resale value of the lots (Tr. 7599, 7708–09). He found five classifications of lots in Horizon City: (1) developed lots in the central core area; (2) lots adjoining the core area where utilities are to be installed in a short time; (3) lots fronting on a paved road which might or might not have water and electricity (Tr. 7600); (4) lots on a rough graded road with no utilities; and (5) lots not located on any road with no utilities. He estimated 90 percent of the lots would be in category 4 or 5 (Tr. 7600–01). Mr. Mann would recommend against investment in category 4 and 5 lots on the basis of the lack of utilization within any foreseeable future and the large number available with a limited demand (Tr. 7625–26, 7629–30).

Mr. Mann located 20 separate sales transactions which he used as comparables for appraisal purposes (Tr. 7603; CX 892D–E). His appraisals are as follows (CX 892):

Typical No. 1 - zoned Multi-family Lot 19, Block 389, Unit 54 - Mountain Shadow Estates - $250.

Typical No. 2 - Zoned Multi-family **[209]**Lot 27, Block 15, Unit 19 - Horizon City Estates - $250.

Typical No. 3 Lot 10, Block 38, Unit 44 - Horizon City - $750. (One quarter mile north off Horizon Boulevard)

Typical No. 4 - Zoned single family Lot 152, Block 232, Unit 30, Mountain Shadow Estates - $250

Typical No. 5 - No Zoning Lot 16, Block 69, Unit 19, Sunland Estates - $350. (6/10 mile south of Horizon Boulevard)

Typical No. 6 - Zoned single family Lot 10, Block 687, Unit 82, Horizon City - $500

Typical No. 7 - Zoned single family Lot 47, Block 17, Unit 53, Horizon City Estates - $250

Typical No. 8 - Zoned commercial, Lot 9, Block 1, Unit 32, El Paso East - $1500 (Backs up to lot which fronts on Horizon Boulevard)

Typical No. 9 - Zoned commercial Lot 13, Block 2, Unit 15, Horizon City Estates - $250

Typical No. 10 Lot 19, Block 51, Unit 10, Horizon Heights - $4,500 (Located in development area, has fronting on street with curb and gutter but not paved).

Lots located in close proximity to Horizon Boulevard, which has electric lines and a water main, could be utilized within a reasonable

time, according to Mr. Mann (Tr. 7658–59, 7663–64). In Mr.Mann's opinion, once outside the core area and away from Horizon Boulevard, there was no correlation of increased price with decreased distance (Tr. 7677). Mr. Mann stated that his valuations, placed on these lots were estimates (Tr. 7699), and that the margin of error could be as high as 30 percent (Tr. 7700, 7738). In Mr. Mann's opinion, the "highest and best use" for Typicals 1, 2, 4, 5, 6, 7 and 9 would be to discontinue payment of taxes, thereby defaulting and claim the appropriate investment loss as an income tax deduction (CX 892). Typical No. 8 is zoned commercial. Mr. Mann's opinion is that the highest and best use of this lot would be residential (CX 892). The market value which Mr. Mann assigned to the typical lots took into consideration the exchange privilege which Horizon's contracts provide (Tr. 7713, 7738).

(4) *Testimony of Frank Mangin*

106. Frank Mangin, Program Director for Economic Development for the Arizona Governor's Office, Planning Department, since December 1975, testified for complaint counsel (Tr. 3372). His **[210]** duties consist of directing the program of attracting employment-based industries to Arizona (Tr. 3372). Prior to his employment with the Governor's office, Mr. Mangin was Executive Director of the Douglas (Cochise County), Arizona Chamber of Commerce and consultant to the City of Douglas Industrial Development Authority and the Cochise County Industrial Authority, and prior thereto Mr. Mangin was employed by the Valley National Bank as Vice President of Industrial Development. Valley National Bank had 160 offices statewide (Tr. 3433). Mr. Mangin was a real estate broker from 1959 until 1965 (Tr.3374–75).

Mr. Mangin testified that there are almost 73 million acres of land in Arizona, of which approximately 18 percent is privately deeded (Tr. 3379). Twenty years ago only 13 percent of the land was publicly held; the State of Arizona has been selling state-owned land to the public in recent years (Tr. 3380–83). The Indian reservations in Arizona have leased some lands for commercial and industrial purposes (Tr. 3385).

Mr. Mangin testified that housing availability is part of the structure necessary to support any other kind of economic activity, and he is familiar with housing availabilities and potentials in various areas of the state (Tr. 3387–88).

In Mr. Mangin's opinion Whispering Ranch is suitable only for cattle grazing (Tr. 3424). He testified that Whispering Ranch is so far

removed from economic activity and utilities that no one to his knowledge has thought about Whispering Ranch as a potential residential area (Tr. 3389). It does not have any value for any commercial or industrial purpose (Tr. 3390). The location has no labor force, transportation access or utilities (Tr. 3390–93). Mr. Mangin cannot conceive of Whispering Ranch having any value within the next 30 years for residential, commercial or industrial purposes (Tr. 3396). He testified that Whispering Ranch was "removed from people, roads, utilities and, consequently, demand for the use of it" (Tr. 3424). He testified that Phoenix was growing in a number of directions and its growth has stopped far short of Whispering Ranch (Tr. 3427–28).

Mr. Mangin has been associated closely with Cochise County (Tr. 3374–75, 3396, 34365–37), and he is familiar with Arizona Sunsites. Most residents of Sunsites are retired (Tr. 3404). There is no industrial employment in Sunsites, no inquiries have been received about locating industry in Sunsites, and there is no demonstrable labor supply available in the Sunsites area (Tr. 3400–04). Sunsites has no public schools (Tr. 3404), limited medical services (Tr. 3397–99), and no potential as a retail trade center (Tr. 3406). Growth of Willcox, Douglas and Tucson, towns and cities nearest Sunsites, will have no impact on Sunsites, in the opinion of Mr.Mangin (Tr. 3408–13).

Mr. Mangin noted that Sunsites had started in 1961, and in 1977 had a population of about 850–875 persons (Tr. 3400, 3414), an annual growth rate of about 60 individuals per year. Mr. Mangin projected the growth rate would continue at about the same pace as in the past (Tr. 3415). He does not foresee substantial growth because (i) the newness of the community has worn off, (ii) medical facilities are inadequate for a geriatric population, (iii) there are no significant shopping facilities, and (iv) there is no industry (Tr. 3415–16, 3485). **[211]**

Mr. Mangin stated that any deeded land in Arizona had an economic value in excess of $150 per acre (Tr. 3418, 3479). The Sunsites land would have some value for cattle grazing and farming, except for the fractionalization of ownership and water problems (Tr. 3417–20). Mr. Mangin stated that there might be some minimum value for the land in 5-acre parcels for ranch houses, if water and electricity were available (Tr. 3419). He projected sales to possibly 10–12 persons each year for such low density usage (Tr. 3421).

(5) *Testimony of Roy Humble*

107. Roy Humble, supervisor of the land section of the Maricopa County assessor's office, testified as a witness for complaint counsel (Tr. 3596). His duties consist of appraising, classifying and evaluating all deeded land in Maricopa County for tax purposes (Tr. 3597).

Mr. Humble visited the area which he believed to be Whispering Ranch (Tr. 3603). He drove to the top of a hill, stood on top of his truck and surveyed the property with field glasses. He could observe 5 or 6 miles with the field glasses. He did not see any buildings. He saw native, desert growth, hilly land with washes and ravines (Tr. 3604–08). In the courtroom, he indicated on the aerial photographs several washes on the property, including a "big giant wash" (Tr. 3626–28).

After inspecting the land, Mr. Humble researched the most recent property sales that had taken place in the area. He also examined aerial photographs of the area. He then made a judgment of the market value of the land (Tr. 3613–14). In Arizona property is assessed at 18 percent of its market value (Tr. 3614). Mr. Humble considers the use of the land and other comparable properties in the area (Tr. 3615). In making the appraisal of Whispering Ranch property, Mr. Humble did not give any consideration to the transactions in which Horizon was the seller. He testified:

> I gave no consideration to the selling price of these two and a half or five-acre lots, primarily because the adjoining property didn't conform with what they were paying there. In other words, the trend in this particular area, the desert area, was not what these people were paying for this property in here.
>
> * * * * * * *
>
> Q. Could you give us the reason why you didn't give any consideration to those prices?
>
> A. Market value is defined as a property that's placed on the market for a reasonable length of time with a knowledgeable buyer and [212]knowledgeable seller, when both parties agree to the price and so on. In this case, the information that I had found prior to appraising this property was that these people weren't knowledgeable because of the fact that I found other sales of local people in this area that nowhere near come to the values that appeared on here, so I disregarded the entire market (Tr. 3615–16).

Mr. Humble placed a $50 per acre full cash value on the Whispering Ranch property in 1972 (Tr. 3620, 3631). In 1975 he changed the appraisal to a minimum of $500 per five-acre parcel. He placed this minimum valuation on the property because the economics of mailing out tax bills made the minimum charge appropriate (Tr.

3620–21). Mr. Humble found no sales of Whispering Ranch property by the individual lot owners:

> Yes, I found no resales. That would give the appraiser and the assessor an indication that there was something happening in there if there were some resales (Tr. 3623).

In making the appraisal Mr. Humble considered the current use of the land, not its possible highest and best use (Tr. 3650).

(6) *Testimony of David Hamernick*

108. David Hamernick, a planner with the Arizona Office of Economic Planning and Development, testified for complaint counsel. Mr. Hamernick prepares and gathers statistics in relation to natural resources, water resources, minerals and land use, and analyzes various problems on behalf of the Director of the Office of Economic Planning and Development and the Governor (Tr. 3666).

As of December 1, 1973, Mr. Hamernick conducted an inventory of subdivided land in Arizona outside of the incorporated municipalities. This inventory showed 943,000 acres of land subdivided into approximately 742,000 lots (Tr. 3669; CX 843). Examining the number of dwelling units in the state in 1970 in context with the subdivision inventory report, Mr. Hamernick expressed the opinion that there is an over-supply of subdivided lots available in Arizona for residential purposes (Tr. 3668). Approximately 8.2 percent of the private land in Arizona is in such remote subdivisions. Cochise County had 83,652 acres subdivided into 80,064 lots, and Maricopa County had 127,168 acres subdivided into 110,130 lots (CX 843, p. 8).

According to Mr. Hamernick, there are certain subdivisions in Arizona that do not have to be recorded with the state real estate department (Tr. 3668–69). Mr. Hamernick made an inquiry in April 1975 as to the number of acres in subdivisions that were not, in fact, recorded. He found an additional 537,000 acres in such subdivisions (Tr. 3672–73). In Cochise County there were 97,190 acres in such subdivisions, and 28,160 acres in Maricopa County (Tr. 3674). Mr. Hamernick projected that there was an over-supply of **[213]**vacant lots for the year 2000 based on a population of 4,985,400 for Arizona (Tr. 3793). Since 1974, the population projection for Arizona for the year 2000 has been lowered to 4,057,000 (Tr. 3703–04).

(7) *Testimony of David Altenstadter*

109. David Altenstadter, Cochise County Planning Director since 1970, testified as a witness for complaint counsel (Tr. 4797). Prior to becoming Planning Director for Cochise County, Mr. Altenstadter

was employed by the Delaware Valley Regional Planning Commission in the Philadelphia metropolitan area as a transportation planner. He received a Master's Degree in City Planning from the University of Pennsylvania in 1969 (Tr. 4789).

Mr. Altenstadter prepared a report entitled Cochise County Projective Allocation Model, dated December 1975 (CX 860). This report makes a projection of Cochise County's population at future points in time, 1980, 1990, and 2000, and allocates the population to smaller areas within the county (Tr. 4799, 4800). The report was widely distributed throughout the county (Tr. 4802). Arizona Sunsites is located in Cochise County (Tr. 4805).

The population projection for Cochise County for the year 2000 is 152,778 (Tr. 4806). Arizona Sunsites was shown as having 684 persons in 1970 (Tr. 4812), and was projected to have approximately 5 to 6,000 persons living there in the year 2000 (Tr. 4811–15, 4837). Mr. Altenstadter expects the greatest growth in Cochise County to occur in the Sierra Vista and Fort Huachuca areas (Tr. 4819).

Mr. Altenstadter stated that Cochise County has just over 4 million acres of land within its borders and approximately 40 percent is privately owned (Tr. 4816–17). There is no shortage of private land in Cochise County for development purposes (Tr.4816). There are approximately 120,000 parcels of subdivided land in Cochise County and 60,000 are estimated to be within subdivisions outside incorporated city limits (Tr. 4817). There are some subdivisions that are not recorded and do not have to be recorded under Arizona law (Tr. 4817).

Mr. Altenstadter does not anticipate the growth of Sierra Vista, Fort Huachuca, Tucson or the twin-plant concept at Douglas to have any impact on Arizona Sunsites (Tr. 4820–22, 4848).

B. Respondent's Expert Witnesses

(1) *Testimony of Dr. Benjamin Stevens*

110. Dr. Benjamin Stevens is the President, Director and senior research associate of the Regional Science Institute, a non-profit research corporation doing work in regional analysis, regional economics, industrial location, land development, urban planning, and related field (Tr.14642; RX 1554). The field of regional science includes research into the forces that cause regional economic and urban growth, and encompasses the fields of economics, demographics, and planning (Tr. 14644). **[214]**

Dr. Stevens received a Master's Degree in city planning from the Massachusetts Institute of Technology; his Ph.D. in regional plan-

ning and economics was also awarded by MIT. He has taught as a full professor of regional science at the University of Pennsylvania (Tr. 14642–43), where he was also on the doctoral committee for regional science (Tr. 14644–45). He is currently a part-time visiting professor at the University of Massachusetts, teaching the forecasting of economic development and projecting of population growth (Tr. 14663). He has authored or co-authored 60 articles, reports, and discussion papers on various aspects of regional science (RX 1554). These have included studies for the National Institutes of Health, the National Science Foundation, the Council of Environmental Quality of the Environmental Protection Agency, the Corps of Engineers, and various state and city agencies (Tr. 14649–60).

For the last twenty years, Dr. Stevens has been the co-editor of the *Journal of Regional Science,* which is the most highly regarded professional journal in the field of regional science (Tr. 14657; RX 1554). He is a member of several professional societies (RX 1554; Tr. 14663–64).

111. Dr. Steven's assignment for Horizon was to project the population growth of four developments, Paradise Hills, Rio Communities, Horizon City, and Waterwood (Tr. 14659). He reviewed a number of publications and certain parts of the record of this proceeding (Tr. 14665–70; RX 1556); he also visited the four projects (Tr. 14669). He made population projections from the 1970's to the year 2005 (Tr. 14694). Dr. Stevens did not express an opinion as to the investment quality of lots in Horizon's projects (Tr. 14890–91).

Dr. Stevens stated that overall regional projections are likely to be more accurate than for a smaller area, the plusses and minuses in given locations tend to cancel out. As you get smaller, you are more likely to be wrong because many local factors have to be taken into account (Tr. 14700). He also stated that he had not had a previous assignment similar to the studies he did in this proceeding (Tr. 14708–09).

For Horizon City, Dr. Stevens projected for the year 2005 a population of 90,000 as a high, 75,000 as a medium, and 60,000 as a low (Tr. 14713; RX 1557B). For the medium population, approximately 19,000 acres would be utilized (Tr. 14713, 14779). For the El Paso SMSA for the year 2005, Dr. Stevens projected a population of 863,700 as a high, 809,800 as a medium and 745,000 as a low (Tr. 14717; RX 1557B), figures somewhat higher than the El Paso City Planning Commission's projections of 742,450, which Mr.Lusteck used (CX 876; Tr. 14740–43). Dr. Stevens thus projected 67,350 more population in the El Paso SMSA than Mr. Lusteck and the Planning Commission. Mr. Lusteck placed 111,000 persons in the Southeast

sector. Dr. Stevens placed 161,000 persons in this sector (Tr. 14768–70; RX 1557B), a difference of 50,000 persons. Mr. Lusteck concentrated his population in the area of the Southeast within the city limits and the extra-territorial area; Dr. Stevens placed more persons within the Horizon City project (Tr. 14770–72). **[215]**

Dr. Stevens was of the opinion that Horizon's future geographical distributional plan for Horizon City population was reasonable, calling for a concentration of people in the present core area, a smaller core area at the opposite end of Horizon Boulevard near the lake, and a concentration of businesses between the two core areas along Horizon Boulevard (Tr. 14763–65). The distance between the present core area and the core area at the lake would be 10 miles (Tr. 14952).

The Bernalillo County population estimate for 2005 projected by Dr.Stevens was 605,000 for the medium range (RX 1557D; Tr. 14791). For Paradise Hills, a medium population of 29,000 was projected (RX 1557D; Tr. 14806).

Dr. Stevens viewed Rio Communities as a satellite, "semi-independent" of Albuquerque. This refers to the fact that the higher level services—medical, legal, financial, collateral—would be provided by Albuquerque. Also, some portion of the population of Rio Communities would commute to Albuquerque for work (Tr. 14807). The problem of how a satellite community grows was a novel problem for Dr. Stevens (Tr. 114992, 14808–12). In projecting future population for Rio Communities, Dr. Stevens used an equation based on the growth of the nearby metropolitan center - Albuquerque, the distance from the satellite to the metropolitan center, and the distance from the satellite to the interstate highway interchange (Tr. 14985). He projected 10,000 manufacturing jobs for Rio Communities by 2005, roughly 20 percent of the projected industrial growth of Bernalillo County (Tr. 14815). He also projected 2,000 workers commuting to Albuquerque (Tr. 14816).

Dr. Stevens used a questionnaire survey which Horizon conducted of persons who purchased Rio Communities property in 1976 (Tr. 14829). These purchases occurred after issuance of the complaint in this matter [March 11, 1975], and were made on site (Tr.14830). There were 799 responses to the questionnaire. Of these responses Dr. Stevens concluded that 439 intended to eventually retire or relocate to Rio Communities, and another 39 said that they would consider relocation if there was a business opportunity (Tr. 14817–18). The questionnaire gave the ages of the respondents (Tr. 14818, 14831). Dr. Stevens used the responses to the questionnaire to project retirement migration, which he stated was more difficult than

predicting economic growth (Tr. 14825). He did not make an effort to determine the extent of the reliability of the questionnaire (Tr. 14825). Dr. Stevens assumed the questionnaire responses were a random sample since he did not know the total number of questionnaires that were given to purchasers and could not determine the percentage of purchasers who responded (Tr. 14826–30, 14836). The relevant question was: "Are you considering eventual retirement or relocation to one of our communities" (Tr. 15010). Dr. Stevens stated that he would not have designed the questionnaire in that manner (Tr. 15012–13).

Of purchasers under age 25, there were 36 who responded that they intended to retire or relocate in Rio Communities, and 83 responded "maybe" to the question (Tr.14832). The age group 25 to 34 responded 73 "yes" and 135 "maybe"; age group 35 to 44 responded 69 "yes" and 98 "maybe"; age group 44 to 64 responded 60 "yes" and 85 "maybe"; age 65 and over responded 10 "yes" and 7 "maybe" **[216]**(Tr. 14832–33). Dr. Stevens considered one-half of the "maybe" responses as being "yes," indicating an intention to retire or relocate in Rio Communities (Tr. 14834–35). While Dr. Stevens' arithmetic was not entirely accurate, he assumed a total of 441 "yes" responses (Tr. 14835–37).

Dr. Stevens used the percentage of yes responses, 441, over the total returned questionnaires 799, multiplied this percentage times 68,807 individual customers in Rio Communities (Tr. 14837), and arrived at a figure of 38,778 families arriving at Rio Communities. He assumed there would be two persons in the average retiree family which would give you approximately 76,000 persons. Dr. Stevens then projected an actual total of 30,000 retirees arriving at Rio Communities by the year 2005 (Tr. 148235–39). Dr. Stevens was of the opinion that the questionnaire sample, together with other information on the migration rate of retirees into New Mexico, suggested that 500 families of retirees, or 1,000 persons per year, would settle in Rio Communities over the next 30 years (Tr. 14841). Dr. Stevens apparently included other information in his projection of retirees (Tr. 14856–63).

Dr. Stevens' ultimate projection for Rio Communities included 3,300 heads of households in industrial employment, 2,000 heads of households in commutation, and 15,000 heads of households among the retired. Dr. Stevens used an economic multiplier of two trade or service jobs for each of the 20,300 heads of households. These heads of households generate Dr. Stevens' medium population projection for Rio Communities of 60,000 by 2005 (Tr. 14865–67; RX 1557D). Dr. Stevens' high projection is 90,000 population and the low projection

is 30,000 a greater range than for the El Paso projection. Dr. Stevens explained this range on the basis that there were clearly more unknowns in Rio Communities than in the case of El Paso (Tr. 14867). Dr. Stevens stated: "I think, honestly, 60,000 is my best guess . . . ." (Tr. 14997). Dr. Stevens, in effect, projected that Rio Communities will receive 28 percent of the growth of Bernalillo County through 2005 (Tr. 15004–06).

Dr. Stevens considered Waterwood a recreational community. In projecting an average utilization of the Waterwood property Dr. Stevens arrived at an estimate of $10 million dollars per year being spent on second homes in Waterwood by residents of Houston, Dallas and East Texas. He assumed $3,000 per year to keep and maintain such a second home. This would provide for roughly 3,300 houses. Records indicate that one-third of the purchasers of Waterwood property are from outside East Texas. Therefore, Dr. Stevens assumed one-third of the purchasers in the Waterwood project in the future would be from outside East Texas. He thus assumed an additional 1,700 houses, or a total of 5,000 dwelling units to be built in Waterwood by the year 2005. These houses would absorb between 2,500 and 3,000 acres (Tr. 14879–83, 15045). He attributed 40 percent of the development contiguous to the Lake Livingston area to the Waterwood project (Tr. 15029–31): "Our best estimate is 40 percent over the long haul" (Tr. 15032). **[217]**

(2) *Testimony of D. A. Lomax*

112. D.A. Lomax is a professional real estate appraiser and consultant, who specializes in land in Texas, New Mexico, and Arizona. He has been an appraiser for 25 years, and is a member of the American Institute of Real Estate Appraisers (M.A.I.), a Senior Real Estate Appraiser (S.R.E.A.), and an Accredited Rural Appraiser member of the American Society of Farming Managers and Rural Appraisers (A.R.A.). Mr. Lomax is currently the National Vice President of the Society of Real Estate Appraisers, and has served for six years on the Society's Board of Governors. He is the author of the *Rural Appraisal Handbook* for the New Mexico State Tax Commission, a book on condominium appraising. He has also written several articles for professional magazines in the field of appraising. Mr. Lomax has taught real estate appraisal courses at several colleges and universities, and he has been an instructor for the American Institute of Real Estate Appraisers (Tr. 15053–63).

Mr. Lomax has conducted studies for federal agencies, the states of New Mexico, Texas, and Indiana, thirty-one of the thirty-two

counties in New Mexico, and several municipalities, districts and state agencies. He has given expert testimony in federal, state, and local courts, in hearings before the Federal Home Loan Bank Board, the Indian Claims Commission, the Federal Aviation Administration, and before numerous state, municipal, county and city agencies (Tr. 15067).

Mr. Lomax specialized in appraising investment properties, vacant land, and residential properties (Tr. 15065–66). His appraisals often project future value and investment value (Tr. 15068–69). His largest appraisal concerned a six to ten million acre tract in New Mexico. He has also appraised a tract of 550,000 acres and two tracts of 270,000 acres each. In 1966, he appraised approximately one-third of the state of New Mexico (Tr. 15067–68).

113. Mr. Lomax's assignment for Horizon was to evaluate the land at Rio Communities, Horizon City and Paradise Hills and express opinions, both as to value at the time of purchase and future values, and to relate those values to the question of investment value (Tr. 15069). He was to appraise the properties to estimate market value at the time the lots were purchased from Horizon and project future values to the year 2005 (Tr. 15090–91). Mr. Lomax did not concern himself with the current market value of the properties (Tr. 15124).

Mr. Lomax defined market value as the highest price in terms of money that a property will bring in a competitive market, under all requisites of a fair sale, when both the buyer and the seller act prudently, knowledgeably, and assuming the price is not affected by any undue stimulus. Both parties must be well informed and well advised, and a reasonable time must be allowed for exposure to the open market. Payment must be made in cash or by financing which does not affect the price (Tr. 15092).

Mr. Lomax was initially concerned with whether sales by Horizon were in fact representative of market value. To make this determination, he needed to ascertain whether the buyers of Horizon's lots had acted with knowledge when the lots were purchased from Horizon (Tr. 15095–96). To determine knowledgeability [218]Mr. Lomax prepared a survey of the purchasers of Horizon's lots (Tr. 15103–04). He was assisted in this task by Steven Van Dresser, and he also consulted with Drs. William Kinnard and Beryl Boyce, both of the University of Connecticut (Tr. 15105–10).

Steven Van Dresser is employed by Mr. Lomax and is involved with computer programming and selling computer programs (Tr. 15429). He was assigned the task of designing and conducting the survey of Horizon customers to determine their knowledgeability

with respect to their purchases of Horizon property (Tr. 15424). Mr. Van Dresser has a degree in Economics from the University of New Mexico and he has had some experience with surveys (Tr. 15423–24).

A random sample of just over 1,000 customers' names was selected (Tr. 15430). Using the questionnaire which appears in the record as RX 1508A–B, telephone interviews were conducted (Tr. 15432). The original sample included only 244 names; and only 14% were contacted. There were such few responses which had sufficient reliability that a larger sample of 1,010 names were used and 480 interviews were ultimately completed (Tr. 15433–34). Mr. Lomax believed this to be a random sample (Tr. 15108, 15810–11). Mr. Lomax concluded that the customers who purchased land from Horizon were knowledgeable, and that the price paid at the time of purchase represented market value (Tr. 15112).

To determine knowledgeability Mr. Lomax set up an eight point system. The broad categories utilized had to do with educational capabilities, whether the customer had seen the property or other similar properties, whether the customer had prior experience in the acquisition of real estate, and whether undue pressure was utilized in making the sale (Tr. 15112–13). Points were awarded as follows:

One point credit for a high school diploma;
One point credit for a college degree;
One point credit if the customers had seen the property prior to purchase;
One point credit if they waited more than one week to make the purchase;
One point credit for looking at other vacant land properties prior to making the purchase;
One point credit if the customer had considered the purchase of other potential investments;
One point credit if the customer owned other real estate prior to making the purchase, and
One point credit if the purchaser believed it would be several years before the property could be utilized (Tr. 15113–14, 15446). **[219]**

Mr. Lomax rated the responses from customers on the basis of a low, medium and high knowledgeability capacity; zero to two was low, three to five was medium, and six to eight was in the high range.Thirteen percent of those contacted scored low, seventy-two percent scored medium, and fifteen percent scored high (Tr. 15116). Sixty-three percent scored four or higher.

Mr. Lomax admitted that his survey was a test of capacity for knowledge, that he did not test for actual knowledge, and that he

had no way of determining whether or not the purchasers were "truly knowledgeable" (Tr. 15241). He read some of the customer testimony in this proceeding, but chose not to rely upon the testimony as an indicator of purchaser knowledge (Tr. 15266–67). On cross-examination, Mr. Lomax stated that if a material misrepresentation were made to a buyer it would have to be taken into consideration in a determination of buyer knowledgeability (Tr. 15273), and the nondisclosure of material facts could also prevent a buyer from being well-informed or knowledgeable (Tr. 15284). Mr. Lomax testified that a failure to disclose the presence of Rio Rancho Estates, a development of 91,000 acres just north of Albuquerque, could be a material nondisclosure to a buyer of a Rio Communities lot (Tr. 15285).

To determine if Horizon's lots had more than a little value as investments, Mr. Lomax considered three broad categories; the future supply and demand, historic growth patterns, and specific market reactions in the current market (Tr. 15130–31). He did not consider the current resale market for Horizon lots because "there was no marketplace to go to to take a look at resales" (Tr. 15289).

Mr. Lomax estimated 900,000 acres of land was available for development in the Rio Grande Valley around Albuquerque (Tr. 15142). He also concluded that for every person living within the Albuquerque city limits, an urban influence was exercised over approximately two acres of land outside the city limits (Tr. 15150). Using a population for the year 2005 of 700,000 to 750,000 for the Albuquerque area and an urban influence of two acres per person, Mr. Lomax arrived at a figure of 1,400,000 to 1,500,000 acres of land under the urban influence of Albuquerque, which would influence the price structure of the land (Tr. 15159). Since Mr. Lomax found a supply of only 900,000 acres of land available for development, he found significantly more demand than supply (Tr. 15151–62). The supply area considered by Mr. Lomax included Rio Communities (Tr. 15163).

In his historical growth study, Mr. Lomax studied several subdivisions that were started in the 1950's in the Albuquerque area, some of which have not been built out (Tr. 15171–73). He made a study of the price structure of these subdivisions since their inception to the year 1978 (Tr. 15173–78). Mr. Lomax found that improved in-town lots in Albuquerque appreciated at a rate of 18 percent per year; peripheral undeveloped lots appreciated at a rate of 8 percent per year (Tr. 15180). After adjusting for development costs of the in-town lots, he found that lots inside the city and lots influenced by the city

both increased at an 8 percent per year compounded rate (Tr. 15181–827). **[220]**

Mr. Lomax also studied subdivisions that were distant from Albuquerque, as much as 60 miles within the Albuquerque-Rio Grande Valley area through and including Valencia County (Tr. 15188–197). He arrived at a conclusion that there is a basic underlying value of land in eastern Valencia County of $1600 per acre (Tr. 15197), and it can vary as high as $4500 an acre (Tr. 15197–98). He thus concluded that land in Rio Communities has a value today of from $1600 an acre to $4500 an acre (Tr. 15199). Using an 8 percent annual compound rate Mr. Lomax projected land values in Rio Communities from $13,000 an acre to $36,000 an acre by 2005. This would give a return of 7.2 percent on the low value land and a return of 10.2 percent return on the higher value land to the year 2005 for a lot that Horizon sold for $500 in 1968 (Tr. 15201–02). For a lot which Horizon sold for $8900 in 1973, the low side return would be 1.2 percent and 4.5 percent on the high side compounded (Tr. 15202). He projected investment returns from 5.2 percent to 14.6 percent compounded on other Rio Communities lots. He therefore concluded that Rio Communities lots were of more than little value (Tr. 15203).

Using Mr. Lomax's $1600 value of a Rio Communities lot today and projecting a 20% annual compounded return, the lot would sell for $219,792 in 2005. Conversely, using the low projected selling price of $13,000 for a Rio Communities lot in 2005, the discounted price of the lot in 1978 would be $94 (Tr. 15310–11).

According to Mr. Lomax, Paradise Hills' lots have a basic underlying value of $4,000 per acre (Tr. 15205). This value was based on current sales of lots in Paradise Hills (Tr.15206). Paradise Hills lots will have a basic underlying value of $32,000 per acre in 2005 on the 8 percent per year compounded growth (Tr. 15206). Mr. Lomax concluded that Paradise Hills' lots would be a good investment purchased at any time from 1968 through 1975 (Tr. 15207).

Mr. Lomax repeated the procedures he employed in the Albuquerque area in his study of the El Paso area (Tr. 15210). He found that land in the Southeast sector of El Paso that was ready for absorption into the development process was selling for $7,500 to $8,000 per acre (Tr. 15213). Land one step removed from being ready for development was selling for $5,000 per acre, land two steps removed from development was selling for $2–3,000 per acre, and land three steps removed from development was selling for $200 to $2,000 per acre (Tr. 15215). Mr. Lomax explained his "bands" of land as being due to El Paso's structured, controlled growth pattern (Tr. 15216).

Mr. Lomax used the El Paso Planning Department population projections to the years 2005 (Tr. 15216). Based upon these projections for the Southeast Planning sector and assuming orderly growth section by section, Mr. Lomax projected a population of 75,000 for Horizon City by the year 2005. Using the 6.5 percent per annum compounded appreciation rate which he had calculated for the El Paso area (Tr. 15210, 15217), Mr. Lomax predicted land values in 2005 of $37,500 per acre for the first band of land, $27,000 per acre for the second band, $14,000 per acre for the third and $2,000 per acre **[221]**to $12,000 per acre for land in the fourth band (Tr. 15218). Mr. Lomax concluded that the minimum property value in Horizon City will be $14,000 per acre in 2005 (Tr. 15221), and certain land within Horizon will fall within bands one and two. The population projection would absorb 19,000 acres of and in Horizon City, or about 23 percent of the total project (Tr. 15224).

Horizon City lots in band one at a 20% annual compounded rate would be valued at $298 in 1978 discounted, band two lots would be discounted at $196, and band three lots would be discounted at $102 (Tr. 15318). A Horizon City lot valued at $2000 in 1978 would sell for $275,000 in 2005 at an annual rate of return of 20 percent compounded (Tr. 15321). Based on his study and projections, Mr. Lomax concluded that Horizon City lots definitely have more than a little value (Tr. 15227).

Mr. Lomax attributed value to Horizon's exchange privilege (Tr. 15231), to the HCIA's (Tr. 15234), and to specific locations within the properties (Tr. 15236). He did not consider holding costs on the land over the time period, such as taxes, interest paid and interest on investment lost, HCIA payments, and eventual selling costs (Tr. 15281–82, 15313). Nor did he consider liquidation costs; vacant land sales commission rates start at 10 percent (Tr. 15312).

114. During September 1976, Mr. Lomax was interviewed by two complaint counsel in this proceeding. At the time, such counsel were interested in engaging Mr. Lomax as a possible witness for complaint counsel. The following testimony about that interview was elicited on cross-examination:

Q. Do you recall making a statement that "A speculator or an investor does not buy an individual lot, especially in the sticks. He knows he is competing against 100,000 lots and chances of selling that lot are not very good."

A. It is possible that I might have made that statement, yes, sir.

Q. Do you recall making a statement that "A well-informed purchaser would never have bought most of this land unless a user, immediate or otherwise, in buying in a close-in area."

A. Again, it's possible that I might have made that statement, yes, sir.

Q. Do you recall making a statement that you rejected the prices of national sales area lots in valuing property because you didn't think they were good comparables? [222]

A. I probably did make that statement, yes, sir.

Q. Do you also recall answering questions in regard to the local purchasers, in the areas of Rio Communities, and I am referring now specifically to the people who you indicated yesterday, I believe, you had contacted after receiving names from the company.
Do you recall having told Mr. Dowdy and myself that most of those people were poorly informed and that they were not truly well informed?

A. It is possible I—that is not a true representation of what I felt about that survey, but it is possible that I could have made that statement, yes, sir.

Q. Do you recall making a statement that it was impossible to see all lots within the Horizon properties developed in any given period.

A. I think the gist of that statement in such that I probably made the statement. I tend not to ever use such words as "impossible," if I can keep from it.

Q. Do you recall also stating that if the Horizon subdivisions grew just as fast as Albuquerque, it would be the 22nd Century before lots would be developed, all lots would be developed?

A. Yes, I probably made that statement (Tr. 15392–94).

* * * * * * *

Q. Now, do you recall also telling Mr. Dowdy and me that there was no locked-in growth in any direction in the Albuquerque area, and that the main potential for land development is in the west?

A. No, but that is properly a constructive statement insofar as the City of Albuquerque will grow. It will grow to the west. It has problems on the east in that the forest lands have stopped it from effectively growing any further in that direction (Tr. 15396). [223]

* * * * * * *

Q. And do you recall saying that the individual should be able to get compensation for the lack of liquidity in a land investment?

A. That is one of the features of additiveness that should be taken into consideration, yes, sir.

Q. And another feature, you need a higher rate of return than the so-called safe investment because of the greater risk of a land investment?

A. Yes. You are going down the sequence now of classical economic theory as to how a rate of return should classically be built up.

And I think it sounds like I pulled a little professorial stunt on you and we talked about it for a while as to what the classical items of return were.

Q. What are the other items of return?

A. There should be, in line with that, there should also be a loading factor for the possibilities of managing the investment.

Q. Do you recall stating, adding all of this up, you need significant return in land over and above the safe rate of return?

A. I probably said that, yes, sir.

Q. Do you recall also stating that you had recommended against the purchase of Horizon land several times?

A. No, I don't recall saying that.

Q. Did you, in fact, recommend against the purchase of land at any of the Horizon properties at any point in time?

A. I just said I don't recollect having said that and I have already stated here this afternoon that I don't recall ever having consulted with anyone on the purchasing of any of Horizon's land. **[224]**

Q. Do you recall stating that you would not recommend that anyone under any circumstances buy Rio Communities lots unless for use, with one possible exception being Tierra Grande land?

A. It's probable that I said that at that time, yes, sir (Tr. 15398–99).

(3) *Testimony of Sanders Solot*

115. Sanders Solot, a real estate appraiser located in Tucson, Arizona, testified as an expert witness for Horizon. Mr. Solot has been an appraiser for about twenty-five years working primarily in Arizona (Tr. 15590). He is a member of the American Institute of Real Estate Appraisers (M.A.I.) and is a Senior Real Estate Appraiser (S.R.E.A.) (Tr. 15595–91). Mr. Solot is a graduate of the University of Arizona and has taught real estate appraisal courses at the University (Tr. 15591–92).

Mr. Solot's assignment was to estimate the market value of Horizon's Arizona Sunsites and Whispering Ranch properties, and to give a thirty-year projection of those values (Tr. 15597). Mr. Solot visited the properties, read property reports and studied the lands surrounding each property. He testified that he was familiar with the Sunsites project from other work he had performed in Cochise County (Tr. 15601).

Mr. Solot testified that the highest and best use of the Whispering Ranch property is long term land investment, a period he defined as

20 to 30 years (Tr. 15607). Mr. Solot gathered data on other properties which he determined were comparable to Whispering Ranch, and he used those "comparables" as a measure of value for Whispering Ranch (Tr. 15608). He testified that there are four major elements of comparison; physical characteristics, date of the transaction, terms of the transaction, and location. Adjustments can be made in location between the comparables and the subject property (Tr. 15627).

Mr. Solot conducted a survey of Whispering Ranch property owners to confirm selling prices and to learn of the motivation of the purchasers (Tr. 15630). He surveyed 300 Horizon customers and received 183 responses (Tr. 15631). The questionnaire used in the survey, RX 1574, had twelve questions, such as, where did you live when you purchased the Whispering Ranch property; were you as well informed about the purchase and the potential of the property as you have been about other real estate you have purchased; have you inspected the property from the air - on the ground; are you satisfied with the property; what is your opinion as to the value of the property; how long did you anticipate holding the property before utilizing it or selling it; and have you ever utilized the property in the preparation of a financial statement? Based on the survey, Mr. Solot determined that the prices paid Horizon for Whispering Ranch property represented market value (Tr. 15642). [225]

Mr. Solot reached an opinion that Whispering Ranch property had a market value of $700 per acre as of May 15, 1978 (Tr. 15642).

Mr. Solot testified that the highest and best use of Arizona Sunsites property is long term land investment, the same as for Whispering Ranch (Tr. 15646). Mr. Solot also used the "comparable" approach in appraising Sunsites (Tr. 15647). No customer survey was undertaken (Tr. 15656–57). He estimated the market value of the Sunsites lots which contain slightly more than one acre at $1,000; other lots containing .85 acres were appraised at $850 per lot; half-acre lots were appraised at $600 per lot; five-acre parcels were appraised at $1,750; and forty-acre parcels were appraised at $16,000 (Tr. 15658).

To estimate future values of the Whispering Ranch and Sunsites properties, Mr. Solot studied historic sales records of comparable developments in Pima County, approximately 20 miles from Tucson (Tr. 15663–65, 15737). Mr. Solot determined future values to the year "2000 I suppose" (Tr. 15666); he later testified that he computed future values to the year 2005 (Tr. 145671). Mr. Solot determined that the subdivision lot prices in the comparable developments from

1958 to 1978 equalled or exceeded the increase in the consumer index for the same period (Tr. 15670–71).

Mr. Solot determined that the Arizona Sunsites lots would increase at an annual compounded rate of 7 percent. Thus, lots presently valued at $1,000 would have a market value of $6,649 in 2005; $850 lots would have a value of $5,651; $600 lots would have a value of $3,989; lots having a $3,000 market value would be $19,946; and 40-acre lots presently valued at $16,000 would have a market value of $106,381 in 2005 (Tr. 15673–74).

The above projections include three basic assumptions; the population of Arizona increases as expected, there are no radical changes in governmental regulations regarding water, population control, zoning, and utilities, and the inflation rate of seven percent continues (Tr. 15674). He made no projection as to the date Sunsites lots reasonably could be expected to be used as home sites (Tr. 15706).

Whispering Ranch property presently valued at $700 per acre and $3500 for a five-acre tract would be valued at $4,654 per acre or $23,271 for the five acres in 2005 (Tr. 15675). Mr. Solot characterized the Whispering Ranch lots as having more than a little value and as being a sound, prudent investment of discretionary funds over a long term (Tr. 15676). He reached the same conclusion about the Arizona Sunsites lots (Tr. 15677).

Mr. Solot acknowledged that there might not be a resale market today for the Sunsites and Whispering Ranch properties due to an inordinate supply of land. He maintained that there is an opportunity to sell the property under long term conditions, and his appraisals represent the present worth of the future value of the lots (Tr. 15687–88).

Mr. Solot was questioned as to why he did not use sales of Whispering Ranch properties as comparables. He stated that he did **[226]**locate some transactions, but they represented tax loss transactions or property exchanges which he did not use (Tr. 156688–89). One "tax loss" transaction represented a purchase from Horizon for $4500 and a sale at $500 (Tr. 15690). He also made no projection as to the date the Whispering Ranch property could be expected to be used as home sites (Tr.15706). He testified a reasonable time for sale of a lot in Whispering Ranch would be 20 years (Tr. 15709), and that this is a fact a purchaser should be aware of prior to purchasing the property (Tr. 15709).

Mr. Solot was unable to specify whether the 20-year period started at the time of the purchase of the lot, or at the time of his appraisal in 1978; he thought perhaps both dates might be appropriate (Tr. 15709). He stated that the comparables he used in appraising

Whispering Ranch property were sold "reasonably quickly," a year or two. He was unable to explain why a reasonable period for sale of a comparable was two years and for Whispering Ranch was 20 years—"We're dealing in a nonexact science when we talk about real estate evaluation" (Tr. 15710–11). Mr. Solot did not think Whispering Ranch lots were more comparable to each other than land located 50 miles distant from Whispering Ranch (Tr. 15718).

(4) *Testimony of Charles Osenbaugh*

116. Charles Osenbaugh is a real estate appraiser and consultant with Osenbaugh & Associates, a firm he has run since 1958 (Tr. 15752–53). He is an M.A.I., an S.R.E.A. (Tr.15754–55), and a Senior Real Estate Property Sales (S.R.P.S.), which is the next highest designation after S.R.E.A. (Tr. 15755). He is a member of the National, Texas, and Houston Real Estate Associations (Tr. 15755). He has taught for the Society of Real Estate Appraisers, and at the University of Oklahoma, University of Santa Clara, Louisiana State University, and University of Houston (Tr. 15756).

Osenbaugh & Associates have performed appraisals for HUD, General Services Administration, Internal Revenue Service, the State Department, the Department of Justice, Texas, several school districts, oil companies, IBM, Rockwell International, and numerous other companies and individuals (Tr. 15757–58). Mr. Osenbaugh performed the initial appraisal for the Trinity River Authority and the City of Houston of the land now covered by Lake Livingston (Tr. 15758), and of the land acquired for Lake Conroe for the San Jacinto River Authority (Tr. 15758). Mr. Osenbaugh also appraised the original acquisition of 50,000 acres for the Woodlands, (a New Towns development) and he performed a second appraisal of 20,000 acres in Woodlands (Tr. 15759). He has testified as an expert appraiser in the United States Tax Court, federal district courts, bankruptcy courts, and state and county courts in Texas.

Mr. Osenbaugh's assignment for Horizon was to look at the viability of Waterwood and to determine if the prices at which Horizon was selling the lots were synonymous with the market value of the lots (Tr. 15759–60). In carrying out this assignment, Mr. Osenbaugh looked at the selling prices of Waterwood lots from 1973 to the time of his testimony in 1978 (Tr. 15760). He did not utilize the standard definition of market value because it is his opinion that there will not be a resale market for the lots until 1984 **[227]**(Tr. 15761). Utilities will not be placed to the lots until ten years plus one year from the date the Waterwood project sales began, and "whoever

bought was locked in until that period of time when the utilities got in" (Tr. 15761). Mr. Osenbaugh took into account this "absence of resale value" (Tr. 15761).

Mr. Osenbaugh testified that to determine market value you had to have a knowledgeable buyer and seller, someone who is apprised of a reasonable number of factors in the market (Tr. 15762). Knowledgeability means the purchasers have the facts about the property (Tr. 15782). To determine knowledgeability, Mr. Osenbaugh looked at addresses of purchasers of Waterwood property and from his own familiarity with the area he determined the income levels of the purchasers. He did not interview the purchasers (Tr. 15780, 15785). He examined the sales brochures and examined the layout at Waterwood as compared to other recreational areas. He considered that 43 percent of the purchasers whose addresses he examined had either purchased on site, or were from Houston. From a sales presentation which he received on Waterwood property and from reading selected transcripts of this proceeding, Mr. Osenbaugh concluded that the purchasers of Waterwood property were knowledgeable (Tr. 15772).

In determining the value of the lots, Mr. Osenbaugh took into consideration the location's proximity to major populations centers, the ease of access, the facilities, the water location, the timber and the terrain (Tr. 15772). He concluded that the prices paid to Horizon by the purchasers were synonymous with market value (Tr. 15773).

Mr. Osenbaugh stated on cross-examination that one factor pertinent to buyer knowledgeability would be knowledge on the buyer's part that Horizon owns a total of 25,000 acres in the Waterwood project (Tr. 15783–84). He also testified that as long as Horizon is in the market and has an inventory of lots, Horizon will "get the first crack at anybody that comes in," and Horizon's prices will set the upper limit of any resale market (Tr. 15794–95).

(5) *Testimony of Alan Nevin*

117. Alan Nevin testified as an expert witness for Horizon. Mr. Nevin is a consulting economist with Sanford Goodkin Research Corporation, Del Mar, California, and serves as Senior Vice President of that firm (Tr. 15806). Sanford Goodkin provides investment advice in consultation to the real estate and lending community (Tr. 15806). Mr. Nevin's areas of expertise deal with land, new construction, and the technicalities of feasibility (Tr. 15807). Mr. Nevin is also associated with a partnership which gives estate planning advice (Tr.

15809–10). Previous employment included stints with Ernst & Ernst, Gladstone Associates and American Housing Guild (Tr. 15811).

Mr. Nevin received a B.A. from American University in Media Management (advertising), a Master of Arts Degree in statistical research from Stanford University, and a Masters Degree in Business Administration from American University. He has taken some advance courses leading to a Ph.D. degree in real estate economics (Tr. 15807). Mr. Nevin testified that he is "pretty well considered an expert in the field of demographics and community growth" (Tr. 15813). **[228]**

Mr. Nevin has participated in a number of studies of undeveloped land (Tr. 15812–17). A key element of the studies is "they want to know, when it's all said and done, are they going to make money" (Tr. 15815). The time element usually involved in the studies is 10 to 25 years (Tr. 15815).

Mr. Nevin's assignment was to analyze Rio Communities, Paradise Hills, Horizon City and Waterwood to judge whether investments in land in those communities would be reasonable investments (Tr. 15818–19). Mr. Nevin began this assignment by looking at the Sunbelt, an area extending south from a line across the United States from Washington, D.C. to all of California. Thereafter he looked at the states where the properties are located, then at the nearby metropolitan areas, and ending up at the specific properties (Tr. 15820–21). Mr. Nevin had to determine the growth pattern of the metropolitan areas and the potential for utilizing the land within a reasonable period of time (Tr. 15822).

Mr. Nevin stated that Horizon's communities are very similar to the federal government's New Town projects, which have been "a massive failure, very massive" (Tr. 15900). He stated that 21 of the 23 "New Towns" had declared bankruptcy (Tr. 15901). He further stated that a New Town would have to generate 1,000 housing units per year to stay solvent (Tr. 15901). He stated that even the best studies showed the "New Towns" would not break even for 14 or 15 years—"that's pretty horrendous, going out on a limb for 14–15 years" (Tr. 15901). He testified that Columbia, Maryland, a project of 18,000 acres located between Washington, D.C. and Baltimore, Maryland had managed to develop in excess of 1,000 units per year. That town, acknowledged to be the most successful new town in this country, had financial difficulties and had to be restructured (Tr. 15902). Mr. Nevin attributed the New Town failures to an attempt to change the natural growth directions of an area (Tr. 15905).

Mr. Nevin is of the opinion that Rio Communities is going to be a suburb of Albuquerque (Tr. 15907), and it is in the Albuquerque

growth directional stream (Tr. 15908). Paradise Hills is already part of the Albuquerque community (Tr. 15906). He considers Horizon City to be definitely in El Paso's path of development (Tr. 15908). Mr. Nevin foresees a need to "market" both Rio Communities and Horizon City (Tr. 15908).

Mr. Nevin predicted a population for Albuquerque of 1,250,000 by 2005, or a growth of 30,000 per year (Tr. 15909). He is of the opinion that Rio Communities will attract 60,000 persons by 2005. The population could reach 90,000—"God only knows I can't put my crystal ball 30 years ahead" (Tr. 15910). Mr. Nevin stated that it was "exceedingly difficult for any one development to attract more than 10 percent of the growth of any metropolitan area" (Tr. 15909). Rio Communities will utilize 30,000 to 35,000 acres by the year 2005 (Tr. 15911).

Mr. Nevin is of the opinion El Paso will grow at a rate of 15,000 persons per year, and that will give El Paso a population **[229]**of 850,000 by 2005. Horizon City will receive approximately 75,000 persons, or about 9 percent of the population gain. This is about 2,700 persons per year, or about 900 households per year. By 2005 this population growth will absorb about 20 - 22,000 acres of Horizon City land (Tr. 15912–13).

In evaluating the lots for investment, Mr. Nevin considered an investment by an individual to have a completely different set of criteria than a major firm investment (Tr. 15915). The individual utilized discretionary funds, a corporation invests on its philosophy governing corporate funds (Tr. 15916). Mr. Nevin compiled a customer profile from Horizon's corporate record of purchasers of Horizon City and Rio Communities lots during the period 1970–1973 (Tr. 15916). He developed information as to the total amount invested by each customer; customers who were deeded, who were still paying, and who cancelled out; and customers who visited the property. These categories were then analyzed as to age, whether they rented or owned a home, their income and their profession (Tr. 15918). In the customer profile, 40.5 percent of the deeded or active customers had incomes under $10,000; 43 percent had incomes between $10 and $15,000; and 16 percent had incomes of over $15,000 (Tr. 15990–91). Of the contracts that were cancelled or superseded, 43 percent had incomes under $10,000 (Tr. 15992). From this buyer profile, Mr. Nevin determined that buyers had used discretionary income in purchasing Horizon property (Tr. 15920). From the same profile he determined that the customers were knowledgeable (Tr. 15922). Mr. Nevin used existing records for the customer profile; he did not develop an independent questionnaire.

One factor Mr. Nevin did not have, in determining discretionary income, was the number of children or dependents in a purchaser's family (Tr. 15986).

Mr. Nevin testified that the risks of purchasing land are (1) when can you sell the land - liquidity, (2) and the appreciation history (Tr. 15933–34). Mr. Nevin projected an 8 percent compounded annual rate of appreciation on a "substantial" number of Rio Communities lots, depending on location within the development. Others would appreciate at a 3 or 4 percent annual compounded rate, and still others would appreciate at a 12 to 15 percent range, depending upon how fast they are utilized for development (Tr. 15945–47). The lots in Rio Communities were of more than a little value according to Mr. Nevin (Tr. 15950–51): "I have to say some of them are not very good values, but I would say most of them are acceptable, reasonable values" (Tr.15950), good or reasonable investments (Tr. 15955).

Mr. Nevin also used an 8 percent compounded annual appreciation rate for Horizon City lots, with some lots appreciating at a higher rate and some lots appreciating at a lower rate, probably 4 or 5 percent compounded (Tr. 15952). In Mr. Nevin's opinion, these lots have more than little value (Tr. 15953), and are reasonable to good investments (Tr. 15954).

On cross-examination Mr. Nevin stated that he had determined in his own mind that inflation would continue at a 6 percent per year rate and real estate would carry an increased inflation in value of 8 percent per year (Tr. 16023, 16065–66). **[230]**

Paradise Hills lots were characterized by Mr. Nevin as "very good investments" (Tr. 15953). Mr. Nevin stated that he hesitates to call anything an "excellent investment" (Tr. 15956):

> Q. In analyzing a purchase from the point of view of the purchaser, in your opinion, can an investment of Horizon lots, where there is uncertainty as to the time of resale, be considered an excellent investment with little or no financial risk?
>
> A. Absolutely not.
>
> Q. In analyzing a purchase from the point of view from the purchaser, can an investment of Horizon lots, where there is uncertainty with respect to the amount of the resale price, be considered an excellent investment with little or no financial risk?
>
> A. No. (Tr. 15956).

Mr. Nevin analyzed Waterwood lots as an investment opportunity in a second home or recreational community (Tr. 15957). In Mr. Nevin's opinion, the future value of Waterwood lots is going to depend very much on the marketing ability of the developing company (Tr. 15957). Mr. Nevin believes the lots will appreciate at a

rate of 8 to 10 percent per year compounded "as long as the momentum of the marketing is continued" (Tr. 15958). He testified that the lots at Waterwood purchased during the period 1973–1975 represent a good value as an investment (Tr. 15962).

Mr. Nevin described the Horizon communities as "bastard" cases because Horizon has shifted the financial burden of its developments to the lot purchasers (Tr.16032–34). He testified:

The Horizon Communities are a bastard case, as it were, in that it is a form of master plan development, where the future buyers or home owners have bought the land, in essence, for cash, so the parent corporation has limited carrying costs on the land. Since I took on this assignment, I have been wrestling with this direct issue, because it almost seems that Horizon may have the best of all worlds, in that they have the land—the land is already pre-purchased by the land owners, by the lot owners, and, therefore, Horizon doesn't have the heavy carryingcosts on the land that normally cripple new towns. (Tr. 16032). **[231]**

C. Horizon's Core Areas

(1) *Paradise Hills*

118. Horizon retains about 4,500 acres in Paradise Hills adjacent to the present development area, which have not been developed (RX 1535A; Tr. 14025). The developed area consisted of approximately 1,100 dwelling units as of June 1978, with about 100 units under construction. The developed acreage consisted of 1500 acres, which includes a 185 acre golf course (Tr. 14025; CX 67Z–2, 122). Thus, Horizon owns three times as much acreage in Paradise Hills as has been developed in the past several years.

(2) *Rio Communities*

119. There are several core areas retained by Horizon in Rio Communities, only one of which has existing development. Core Area I, where development has occurred and is occurring, consists of 5,400 acres, platted as follows; 3200 acres consisting of 5600 single family lots, 500 acres multi-family, 300 acres commercial, 600 industrial, and 800 acres recreational schools and parks (RX 1539B). There were approximately 800 dwelling units as of June 1978; about 1000 acres have been utilized, including a golf course (Tr. 14013–14; CX 67Z–4).

Horizon has retained Core Area II in Rio del Oro adjacent to where the Monzano Expressway may enter the project, and it will have the nearest location to Albuquerque. This core area consists of 2000 acres platted as follows: 1,000 acres consisting of 2500 single family lots, 350 acres multi-family, 150 acres commercial, 500 acres

recreational, schools and parks (RX 1539B; Tr. 13983–86, 14015). There possibly will be a connecting highway between these two core areas (Tr. 13986). There is no development in this core area.

An additional core area of 5,300 acres has been retained by Horizon in Canyon del Rio platted as follows: 4,000 acres consisting of 2,000 single family lots, 1,200 acres multi-family, 100 acres recreational, schools and parks (RX 1539B; Tr. 14015). There is no development in this core area.

Horizon has a core area in Tierra Grande consisting of 3,300 acres platted as follows: 2,000 acres industrial, 1,300 acres commercial (RX 1539B; Tr. 13986, 14015). This property parallels the railroad on both sides for several miles (Tr. 14016, 14014, 14495; RX 1539B, 1540, 1546). There are 8 homes constructed in the 83,000 acre Tierra Grande property. In addition, Horizon retains six "town centers" throughout Rio Communities consisting of approximately 500 acres (RX 1539B).

(3) *Horizon City*

120. The existing core area at Horizon City has 6,400 acres platted as follows: 4,000 acres consisting of 10,000 single family lots; 800 acres multi-family; 500 acres commercial; 600 acres industrial and 600 acres recreational, schools and parks (RX 1536B; Tr. 13979, 14019). As of **[232]**June 1978, about 600 acres of this core area had been developed and there were approximately 800 homes completed (Tr. 14020–22).

Horizon has retained a 4,000 acre core area near what is termed Lake Horizon, which is about 10 miles from the existing core. The two areas are connected by Horizon Boulevard. There is no construction at this second core area. The 4,000 acres are platted as follows: 2,000 acres consisting of 5000 single family lots; 700 acres multi-family; 250 acres commercial; and 1,050 acres recreational, schools and parks (RX 1536B; Tr. 13977, 14022).

Horizon also retained approximately 1,500 acres in core areas located throughout the Horizon City project (RX 1536B).

(4) *Waterwood*

121. The Waterwood project consists of 25,000 acres of land, with only 7 - 8000 acres presently subdivided (Tr. 14520). Whispering Pines Units 1 and 2 and Country Club Estates are fully improved, consisting of about 1,000 acres which includes the golf course and the other facilities (CX Z 67–Z6). Within other Whispering Pines Units

there are 2,823 single family lots, 230 multi-family lots and 12 commercial lots, none of which have been sold (RX 1543A).

Deer Creek Village has 4,976 single family lots and 159 multi-family lots, of which 1411 had been sold and 178 deeded as of May 4, 1978 (RX 1543A).

Green Tree Village has 2,356 single family lots and 133 multi-family lots, of which 895 had been sold and 98 deeded as of May 4, 1978 (RX1543A).

(5) *Arizona Sunsites*

122. The core area at Arizona Sunsites consists of approximately 760 acres, about one-half of which is now developed. There are approximately 400 dwelling units in the core area, along with a golf course and other buildings (RX 1235R; Tr. 13041, 14023). There are approximately 38 homes outside the core area (Tr. 14024). Horizon owns 12,000 acres in Arizona Sunsites in a parcel named Iozona (Tr. 14023). A real estate broker testified that there were between 800 and 1,000 lots in the Sunsites building area that are vacant and owned by Horizon (Tr. 4040–41).

None of the future core areas in Horizon's properties, are, or have been, for sale to builders (Tr. 14028). In 1975 Horizon ceased its own building operations, and it now sells developed lots in existing core areas to builders (Tr. 14026).

D. The Resale Market For Horizon Lots

(1) *Paradise Hills*

123. As of August 2, 1975, Paradise Hills had a total of 6,583 lots of which 1,131 had been deeded and 928 sold but not deeded, leaving 4,524 lots **[233]**owned by Horizon. These lots were platted as follows: 5,381 single family, 142 multi-family, 80 commercial, 5 commercial/multi-family, and 975 bulk lots (CX 873A). Horizon owned all the multi-family lots, 4,162 of the single family lots, but only 106 of the bulk lots. The record does not establish whether the deeded lots had homes or other buildings erected on them as of August 1975. Individual investment in Paradise Hills consisted primarily of bulk acreage where no development has occurred.

Record evidence of resale activity in Paradise Hills is limited (Tr. 6629–30). Professor Stevenson found only limited resale activity in Paradise Hills, and all this activity was concentrated in the development area (Tr. 6737–38, 6832–36). William A. Kelly, a realtor in Paradise Hills who formerly was a Horizon sales representative

(16540–41), testified that owners of the bulk acreage in Paradise Hills contacted him regularly to have their property listed. From 50 to 100 persons sought to list bulk acreage with his firm between 1975 and 1978 (Tr. 16456–47). His firm has not accepted listings for any of these lots (Tr. 16548). He has informed persons seeking to have their property listed that there is no market locally for the lots; that no one is interested in buying them (Tr. 16548–49). Owners of lots in the Knolls area of Paradise Hills have sought to have his firm list their lots. His firm has accepted listings of lots closest to the building area, and rejected those nowhere near the building area (Tr. 16562–63). Mr. Kelly stated that he had sold about sixty developed lots in Paradise Hills in 1977, but "very few,""three or four,"undeveloped lots (Tr. 16608).

When Mr. Kelly worked for Horizon he received information that the lots in the Knolls had a Horizon "book value" of $3300 (Tr. 16563). He testified that Horizon recently had attempted to repurchase those lots for $2200, which was much less than the price at which Horizon had sold the lots (Tr. 16563–66; see RX 1535A for selling prices of Paradise Hills property).

Mel Kupetz, President of Rocky Mountain Land Auction Company, testified that in November 1975, land in Paradise Hills was put up for auction in Albuquerque by his company. There were 63 listings of Paradise Hills property covering one or more lots each (CX 870, 871A–B). Offers were sought on all lots. Only two lots were sold as a result of this auction (Tr. 5128–29).

CX 817A–N represents all Albuquerque Board of Realtors Multiple Listing Service listings of property in Paradise Hills for the period 1970–1974. CX 817A reports a sale of an undeveloped 2 ½ acre lot in April 1974 for $2500. This information is insufficient to establish whether the seller made a profit on the transactions over and above costs. The remainder of the sales were developed lots. It is noted that Horizon Realty, an Horizon subsidiary (Tr. 2805), was the sales agent on most of these transactions. Horizon did not come forward with any reliable information of sales of undeveloped property in Paradise Hills.

The information available in the record establishes that there was no resale market for undeveloped lots in Paradise Hills as of 1978.

(2) *Rio Communities*

124. As of August 2, 1975, Rio Communities had a total of 172,020 lots of which 68,029 had been deeded, and 73,688 sold but not deeded, **[234]**leaving 30,303 owned by Horizon. These lots were

platted as follows: 131,578 single family, 17,327 multi-family, 11,486 commercial and industrial, and 11,629 bulk lots (CX 873B–C).

John Maguire, a former Horizon sales representative, had been a real estate broker in Belen, New Mexico, for four and one-half years at the time he testified in this proceeding in June, 1977, and he had operated his own real estate business for about three of those years (Tr. 2780–81). Mr. Maguire testified that he takes listings for all kinds of real estate in New Mexico. Most of his listings for undeveloped land are in Rio Communities (Tr. 2782). Mr. Maguire has received more than 1,000 requests for Rio Communities lots to be listed for sale during the period from May 1974 to June 20, 1977. The firm accepted about 600 listings, which were about equally divided between Rio del Oro and Rio Grande Estates, ranging from one mile up to 17 or 18 miles from the core area (Tr. 2782–85, 2800). Of these approximately 600 listings for Rio Communities lots, only two ½ acre lots in Rio Grande Estates had been sold. The firm sold one lot in Unit D, for $250 in 1975, and another lot, in Unit S, for $100 in 1976 (Tr. 2782–87).

Some of the owners of Rio Communities' lots who requested listings were advised of the slim possibilities of selling the lot and of the considerable length of time Mr. Maguire would require for a listing. Mr. Maguire testified that "then we wouldn't hear from them any more" (Tr. 2786). He would inform other owners of Rio Communities lots that there was "absolutely no way" the firm could sell their property "regardless of what happens . . . except for a few dollars" (Tr. 2785–86). If someone really wanted to have him accept a listing, however, he would do so. (Tr. 2793).

Mr. Maguire made substantial efforts to sell Rio Communities' lots for which he had taken listings. He has advertised weekly in the local, Belen newspaper. He also ran advertisements in newspapers in 14 northeastern and midwestern cities, such as Chicago, New York, Philadelphia and Boston. Few people responded to these advertisements (Tr. 2787–92). In addition, brokers in the Albuquerque area are aware that Mr. Maguire has listed Rio Communities lots, but these firms have not sold any lots from him (Tr. 2792).

The Albuquerque Board of Realtors has a Multiple Listing Service ("MLS"), which circulates listings of properties for sale among its members. The number of subscribers to the MLS went from 235 to 1160 over the period from 1962 to 1977 (Tr. 2929, 2932, 2846–47). Listings are for all types of real property, including vacant land, and cover a geographic area 35 miles from the Bernalillo County Court House in all directions (Tr. 2846–47). By regulation, the Board requires all members to report all sales to the MLS (Tr. 2856).

The MLS has taken listings of vacant lots in Rio Communities (Tr. 2858). Of listings taken in 1972 and 1973, 27 in Rio Grande Estates and 10 in Rio del Oro, all expired in 1973 and 1974 without a sale recorded (CX 818A–Z2, 819A–J). The MLS has also kept records of 63 other listings during the period from 1973 to 1977 in Rio Communities with a sale recorded in only two instances. (CX 820A–P, 821, 822A–D, 823A–U, 824A–Z7). One of the sales, a Rio Grande Estates lot in Unit 5, sold for $850; it was listed for $1,500 (CX 821). Horizon's selling price for similar lots in 1973 was $1,200 (RX 1541B). The second sale, **[235]**a 10-acre parcel in Tierra Grande, was sold for $4,500 in 1976 (CX 824Z5); Horizon's selling price for similar lots in 1976 was $7,300 (RX 1541G). Some listings which expired without a sale being recorded indicated that: the offering price was below the price for which Horizon was selling comparable lots (CX 819 B,D,E,H; RX 1541H), the buyer could exercise the exchange privilege for other land in more developed sections of Rio Communities (CX 818M, Y), financing would be provided (CX 818W, 819G), the price was less than the seller's original cost (CX 819D; RX 1541H) the lots were "multi-family" (CX 819G), and the owner would accept any reasonable offer (CX 818J, W).

Ronald Williams, administrative assistant to the executive vice president of the Albuquerque Board of Realtors from 1967–1976 (Tr. 2929–30), testified that from 1967 to early 1974 the MLS circulated information to its subscribers about inquiries from lot owners desiring to sell their Rio Communities lots (Tr. 2930–34). At that point the MLS stopped circulating this information because of complaints from MSL subscribers that no action was being taken upon the inquiries and the information "cluttered up" the circulations (Tr. 2934–36). From about the spring of 1974 until June or July 1976, the Board sent a form letter to those who inquired about the sale of lots in Rio Communities (Tr. 2936) that the Board felt there was little local market for such Rio lots (Tr. 2942–43).

Efforts to sell Rio Communities lots through two auctions produced minimal results. The Rocky Mountain Land Auction Company held two auctions, one on August 2–3, and another on November 20–22, 1975 at the Albuquerque Convention Center (CX 865a, 868a). Owners of deeded lots in Rio Communities were contacted to determine if they wanted to offer their lots for sale at the auctions (Tr. 5083). Mel Kupetz, the owner of the Auction Company, testified that he spent about 9 months of working time on efforts connected with these auctions (Tr. 5081, 5114, 5129–30). Expenses of $10,726 were incurred in connection with the first auction, and of $11,421 with the second auction (CX 869, 872). These expenses included

"saturation" advertising campaigns which used the newspapers with the greatest circulation and radio stations with the largest audience in Albuquerque (CX 866, 869, 872, 867; Tr. 5100–02, 5225–19). Additional publicity for these auctions included newspaper articles, a television feature and invitations to 30 builders in the Albuquerque area (Tr. 5102–03, 5119).

Prior to the auctions, Mr. Kupetz contacted brokers in the Albuquerque area to assist him. Of the 10 he contacted, 9 expressed no interest in participating. They told him that they had not had any luck selling Rio Communities property and they did not want to have further involvement with it (Tr. 5103–04). Mr. Kupetz, however, was able to locate a broker to assist at the auctions. Peter Olguin, an Albuquerque real estate broker assisted with the first auction (Tr. 5104–05, 2662–64), and Gertrude Kaveny assisted at the second auction (Tr. 2804–06; CX 813). The auctioneers at the auctions had previously conducted auctions of land (Tr. 5156–57). Large blowups of subdivision maps were used to explain the locations of lots. Members of the audience received smaller maps of the property (Tr. 5109, 5122–23). Listings of lots were also available before the auction (Tr. 5094, 5107–08, 5121). The audience was informed before the auction began that offers seeking financing from the seller would be submitted to the sellers (Tr. 5109). **[236]**Once the auctions began, the auctioneer sought bids at any amount if he failed to receive a bid for a given lot at or above the minimum price listed (Tr. 5109–5111, 5123). Bids as low as $5 or $10 for a lot would be accepted, "start it anywhere you want" (Tr. 5110).

The Auction Company accepted about 1,000 listings for the first auction of Rio Communities lots, and rejected an additional 200 to 300 because they were received too late to be included in the printing (Tr. 5099–5100; CX 865a–f). At the auction in August 1975, all of the lots accepted were offered for sale (Tr. 5111–12). All offers made at the auction were submitted to the owners whose lots were the subject of bid offers (Tr. 5131). The result of this auction was that offers were submitted to sellers on only 10 lots. Eight of the lots, all in Rio Grande Estates, were sold, at prices ranging from $200 to $500 (Tr. 2674–79; CX 802a–g).

For its November 1975 auction of Rio Communities lots, the Auction Company accepted listings for about 1,200 lots and rejected listings for about 200–300 lots which were received too late to list (Tr. 5114–15). Listings covered between one and six lots, and lots were located in Rio Grande Estates, Rio del Oro, and Rancho Rio Grande (CX 868A–O). All lots were offered; bids were made on only about 25 or 30 lots (Tr. 5123–24, 5125). All of these bids were submitted to lot

owners, and about 20 were sold at prices approximating $200 per lot (Tr. 5125–26).

Professor Howard Stevenson concluded that the resale market for Rio Communities lots was negligible (Tr. 6713). He based his conclusion on contact with brokers and a review of the testimony of persons from the Albuquerque Board of Realtors (Tr. 6710–13). John Maguire told him that the most of the outlying lots were unsaleable (Tr. 6711). Gladys DeLettera of Cullins Realty in Belen told Professor Stevenson that her firm actively discouraged listings of lots in the various subdivisions in Rio Communities with a few minor exceptions. These exceptions were lots in Units 1 and 2 of Rio Grande Estates; a narrow band along State Highway 6; and lots near the 4 or 5 houses in Rancho Rio Grande or near the few houses in Tierra Grande (Tr. 6710–13). Professor Stevenson testified:

> Again, my purpose in interviewing these people was not to ascertain the truth, fiction, or whatever, but it was to establish for the benefit of somebody who had not yet purchased what the outlook, attitudes, and potential resale—which creates the investment value—of their property could be.
>
> Q. What was your conclusion as to resale after talking to these people and reviewing the testimony you have mentioned?
>
> A. Negligible. In fact, Mrs. DeLettera was a lot owner, was continuing to make her payments, but when asked why, she said 'Well, I have paid so much down now and maybe some day I can trade it in for closer.'
>
> But even her own lot she felt there was no possibility **[237]**of sale, which was the ultimate party of interest. (Tr. 6713).

A number of customers who testified in this proceeding attempted to sell their Rio Communities property without success (Tr. 837–39, 1565, 1581, 6092–95, 6114, 16164–65, 16265, 16678–79).

(3) *Horizon City*

125. The Horizon City project had 139,507 lots as of August 21, 1975, of which 49,483 had been deeded and 64,711 sold but not deeded, leaving Horizon as the owner of 25,313 lots. These lots were platted as follows: single family 113,328, multi-family 12,816, multi-family/commercial 5,113, commercial 4,284, industrial 37, bulk (2 ½ acres) 3,929 (CX 873C; Tr. 6981).

Lois Zans, an administrative assistant with the El Paso Board of Realtors, testified that the Board's membership had increased from 166 members in 1970 to 354 as of 1977 (Tr. 2378). The Board operates a Realtors Listing Service ("RLS"), and members who participate in the RLS receive copies of summaries of all listings on all types of properties, including vacant land, which are sent to the RLS (Tr.

2376–81). In 1970 the RLS distributed about 400 copies of these listings to realtors who participated in the RLS. By April 1977, the RLS was distributing about 875 to 900 copies of its weekly book containing listings and the same number of its quarterly digest, which compiles all sales and expirations of listings during the preceding quarter (Tr. 2382). RLS listings also reflect the changes which have occurred in vacant land listings, such as the legal status of the property and the terms a buyer will accept (Tr. 2383–85). Where a sale occurred in a listed property, the realtor who had obtained that listing was required to report that sale to the RLS. Information reported included the sales price, terms and date of the sale (Tr. 2387–88). The listing is then pulled from the active listings, with information on the sale included in the weekly listing book and quarterly digest sent to RLS participants (Tr. 2382). Property listed by one RLS member can be and sometimes is sold by another RLS subscriber, or even a non-member of the RLS (Tr. 2382–83, 2443–44).

From at least 1968 to April 1977, the El Paso Board of Realtors has received inquiries from purchasers of lots in Horizon City who were interested in having their lots listed for resale (Tr. 2376, 2388–89). Mrs. Zans testified that the Board had an average of about four inquiries per week (Tr. 2388–89). The RLS notified all of its subscribers on a weekly basis of the inquiries which they received for the resale of lots in Horizon City. Where no realtor indicated an interest in a given lot, the Board of Realtors during the period from at least 1967 to 1977 sent a letter containing the following to the person who inquired about a listing:

> During recent weeks we have polled our REALTORS in hopes of finding someone who will accept listings on property in [Horizon City, or subdivision of that property.] From each we have received basically the same answer. There is no local market for this property and they will not accept any listings on it. (CX 785, 786; Tr. 2388–95). **[238]**

The following summary reflects the approximate number of RLS listings and the listings and sales of land within Horizon City (Tr. 2396–2412):

Year	Horizon City Listings	Number of Listings Sold
1970	8	0 (CX 787A–C)
1971	31	1 (CX 788A–I)
1972	35	3 (CX 789A–I)
1973	35	3 (CX 790A–H)
1974	80	2 (CX 791A–R)
1975	51	3 (CX 792A–X)
1976	26	2 (CX 793A–Z–2)[6]

Thus, from about 1400 inquiries to the RLS there were approximately 266 listings and 14 sales of Horizon City property during the period from 1970 to 1976 (Tr. 2376, 2388–89).

Listings sometimes indicated that they were below Horizon's selling prices for comparable property. For example, the third listing on CX 792W contains the following information: The offering price of $2500 is marked through, $1250 written over it. This listing indicated that the owner will finance the purchase, "carry paper". It also stated that it is a "commercial" lot offered at the price that the "owner paid for property in 1966" and that comparable property was "being sold by Horizon for $3400" at the time of the notation. This listing existed for more than 2 years, from January 1973 to February 1975. Other listings also indicated they were below Horizon's price at the time; *e.g* ., CX 791F, item 2 ("Seller hopes for a fast sale at this reduced price"; 791J, item 2; 791O, item 4 Horizon "reverified" its prices for similar lots at the time). Most resale listings handled by Horizon Realty had asking prices below Horizon's then current sales prices for similar property (Tr. 9637). Listings on lots with the following locations expired without being sold: near lake [Horizon] (CX 792U, item 2, 791G, item 2, 791I, item 3,4); near the golf course (CX 791B, item 1, 791F, item 3); one block from utilities and one-half mile from present subdivision (CX 791E, item 2, "submit all offers"); across the street from where homes are being built (CX 791F, item 3); and one-half mile north of Horizon Boulevard and three-quarter mile from water tank (CX 791J, item 3). Listings expired without being sold where the exchange privilege was mentioned (*e.g.*, CX 792P); financing was offered by the seller (*e.g.*, CX 792P, item 2; 791D, item 4; 791W, item 2 ("submit all offers", 791F, item 1, item 3 [15% down, balance over 10 years]); or through assumption of the balance due Horizon (CX 791K, item 4 "submit all offers").

Oswald Glaze had been a real estate salesman with the El Paso realty firm of DeWitt & Rearick for 5 years as of the time of his testimony in April 1977. He worked out of the office in Horizon City all but the first 18 months of that period (Tr. 2224, 2226). He

[6] Some of the listings shown on CX 787–793 were apparently not Horizon City property (*see* CX 787, 793V).

accepted about 2,000 listings on vacant lots in Horizon City during that period (Tr. 2237–38). **[239]**Mr. Glaze testified that he accepted about 200 listings in 1973, about 600 in 1974, about 800 in 1975, about 200 listings in 1976, and about 100 during the first three months of 1977 (Tr. 2239–40). Listings were usually for a 6-month period until 1976, and for one year after that (Tr. 2250). When Mr. Glaze first began listing lots in Horizon City he listed all lots where someone requested a listing. In 1975 to 1976, he began restricting listings in general to those within a mile of Horizon Boulevard or Rodman Street, adjacent to the developed area in Horizon Manor, or within one to two miles from Lake Horizon (Tr. 2232–36). He testified that his experience had shown that certain lots were not as marketable as others. Also, company policy was to sell only property that you could take people out to see, "put them on the ground and explained to them the general area" (Tr. 2232), how far the property was from utilities, roads, etc. (Tr. 2232). Of the approximately 2,000 listings which Mr. Glaze accepted during the period from 1973 to 1977, only 45 resulted in sales (Tr. 2237, 2244, 2246), 34 of which were outside the developed area (Tr. 2249).

Mr. Glaze was recalled as a defense witness. His testimony at this time was very general and vague as it previously was. He testified that he had refused about 100 requests for listings (Tr. 9877) and had taken about 80 listings on land in Horizon City since his previous testimony one year earlier (Tr. 9836, 9839). About 60 of these parcels did not have utilities (Tr. 9846); he sold 5 of these parcels (Tr. 9840), which were all acreage parcels (Tr. 9841) located adjacent to Horizon Heights.

Mr. Glaze has lived in Horizon City for several years and has had a real estate office there for several years (Tr. 2225–31, 9834–35; RX 1170). The real estate firm with which he is employed, DeWitt & Rearick, is a very large firm, employing approximately 72 sales representatives in 1977 (Tr. 2231). His testimony was from memory; no actual listings showing lot locations, descriptions of property, or selling prices were offered in evidence. However, from Mr. Glaze's testimony, it is apparent that he received many requests for listing Horizon City property, that he refused requests to list undeveloped lots that were not adjacent to the core area or along Horizon Boulevard, and that a resale market for undeveloped lots in the vast Horizon City project was non-existent.

On October 15 and 16, 1975, in El Paso, Texas, the Rocky Mountain Land Auction Company held an auction of lots located in Horizon City (Tr. 5082). Before the auction began, an El Paso real estate broker described the property, using maps to show the

locations of different areas within Horizon City and their proximity to areas already improved. Individuals attending the auction were given brochures on the property to be offered at the auction (Tr. 5090, 5094–95). It was stated that all offers, including those contingent upon financing from the seller and those at prices below the minimum, would be submitted to the seller (Tr. 5092–93, 5095). Between 800 and 900 deeded lots were offered at the auction. No lots were sold, and no bids of any amount were made for these lots (Tr. 5092–97, 5099). Rocky Mountain's expenses for this auction were $10,700 (CX 863). Of this amount, $786 was spent for an advertising campaign two days before the auction, which included advertisements in El Paso's morning and evening newspapers and on the two El Paso radio stations with the largest audiences (CX 862; Tr. 5087–89, 5117–18). **[240]**

Joseph Lusteck, an expert witness who testified for complaint counsel, reviewed the results described above of the listings and sales of the RLS and of Mr. Glaze, as well as the experience at the auction. He also had a search made of 49,483 lots which Horizon had deeded to purchasers, and found only 36 of those subsequently transferred to involve arms' length transactions (Tr. 7060–65). On the basis of his analysis, Mr. Lusteck concluded that there was only a "very shallow" and very weak resale market for unimproved lots in Horizon City (Tr. 7064–67).

Jack Mann, who also testified for complaint counsel as an expert appraiser, studied the resale market for Horizon City property, and was able to locate 20 sales which he used as "comparables" for appraisal purposes (CX 8920,E; Tr. 7602–03). These "comparables" which were undeveloped lots, sold at prices less than the original Horizon sales price (CX 892D, E).

Several customers who testified in this proceeding, related their experiences in attempting, unsuccessfully, to sell their Horizon City property (Tr. 944, 954, 1127–28, 1185, 1654–55, 1838, 1843, 6261–63, 6299–6300, 6496–98).

(4) *Waterwood*

126. As of August 2, 1975, Waterwood had a total of 11,160 lots of which 2,560 had been sold but not deeded, and 79 which had been deeded, leaving Horizon owning 8,521 lots (CX 873H). Only 7,000 of Waterwood's 25,000 acres had been platted as of that date (Finding 121).

The Waterwood property was not placed on the market until 1973. There is little evidence concerning the resale market for Waterwood

lots. The evidence which does exist indicates that there is no resale market for these lots. Horizon set up a resale organization for Waterwood property in 1976, Waterwood Realty (Tr. 8133, 8153–54). Janis Hearn of Waterwood Realty testified that in the two years the realty company had been in business, no vacant (or deferred use) lots were sold even where the owners were willing to sell below Horizon's current price (Tr. 8157). She claimed that there has been resale of developed properties, but none of the undeveloped lots (Tr. 8153). Waterwood Realty has taken listings on approximately 100 vacant lots for individual owners without making a sale (Tr. 8153). Individual buyers are able to get a better deal from Horizon, especially in terms of financing (Tr. 8153).

A more individualized experience was related by Raymond Dickeson, who stated during his testimony in February, 1978, that he had been trying since April 1977 to sell his developed lot (Tr. 8933). Significantly, his lot is located on the golf course and overlooks the lake in Waterwood (Tr. 8937, 8923). The lot was listed with Waterwood Realty [Horizon] which charges a 12% commission, but the listing had expired (Tr. 8936). If he received his asking price, he would lose money compared to what he could have earned in a savings account (Tr. 8937). He testified he would be willing to sell at a loss so he could save the Waterwood improvement fees and tax costs (Tr. 8939).

James Madget, who owned an Horizon City lot which he could not sell, traded for a $6,000 Waterwood lot in August 1974. He was told he would be able to sell that lot right away, and that the sales representative would **[241]**give him names of real estate brokers who would list the lot. Mr. Madget was also told that if he was unable to sell the lot, he could get his money back. He was later able to get the names of real estate brokers from the sales representative - "he did finally after about a month give me the names of several real estate brokers who he said could list the property" (Tr. 1409). Mr. Madget telephoned two brokers who just "laughed" (Tr. 1409–10); he was unable to locate two other brokers (Tr. 1410). Upon recontacting the sales representative, Mr. Madget was sent a "sales package" containing sample newspaper advertisements. He advertised in the Houston *Chronicle*, but he received no response (Tr., 1410). He asked Horizon to trade his Waterwood property for a cheaper parcel, and was told this was against company policy (Tr. 1411). Mr. Madget forfeited $1,352 (Tr. 1413).

Charles Osenbaugh, an expert witness who testified for Horizon and was given an assignment to determine if Horizon's prices for the Waterwood lots were synonymous with the market value of the lots

(Tr. 15759–60), testified that there would be no resale market for the undeveloped lots in Waterwood until 1984 (Tr. 15761).

(5) *Whispering Ranch*

127. As of August 2, 1975, Whispering Ranch had a total of 3,827 lots of which 1,849 had been deeded and 1,672 sold but not deeded, leaving Horizon owning 306 lots (CX 873F).

Frank Mangin, Program Director for Economic Development for the Arizona Governor's Office, Planning Department, testified that he was not aware of any developmental inquiries about the Whispering Ranch property. He stated that it is so far removed from any economic activity, because it has no existing utilities, no one has seriously thought about it for residential purposes or for any other purpose (Tr. 3388–89). Whispering Ranch is not prime real estate; "it is removed from people, roads, utilities and consequently, demand for the use of it." The land is "typical of high desert, rolling country, not unattractive but with no particular reason for any higher use" than the grazing which originally went on when the land was part of a ranch (Tr. 3424).

Claude Wolverton, owner of Red Carpet Realtor in Youngtown, Arizona, testified that he has had numerous inquiries from Whispering Ranch property owners desiring to list their property for sale, but that he advised them that he could not resell the property (Tr. 3225), much less sell it at the prices the owners wanted—$700 to $1500 per acre (Tr. 3226). He has refused to list Whispering Ranch property (Tr. 3225, 3241).

Mr. Wolverton also testified that he has properties listed that are near Whispering Ranch (Tr. 3234), some with electricity (Tr. 3235). These properties have better locations than Whispering Ranch and are being offered for sale below the prices which customers purchasing from Horizon had paid (Tr. 3233–35). To his knowledge, no parcels of land have been resold in Whispering Ranch (Tr. 3240).

Ruth McCaughey of Wickenburg, Arizona, has been in the real estate business near Whispering Ranch since 1971 (Tr. 3253). She testified that during her employment with American Realty, the company would not take **[242]**listings on Whispering Ranch property (Tr. 3257). Since she started her own firm, five people have asked her about listing Whispering Ranch property and she has informed them that there was no market for the property (Tr. 3258).

She, however, has taken three listings on Whispering Ranch property at 20 acres for $11,000, 40 acres for $450 an acre, and 40 acres for $450 an acre. She has not received any offers for these

properties, although they have been listed for one and one-half years (Tr. 3259). She has sold one parcel of land adjoining Whispering Ranch, a parcel of 133 acres at $75 per acre (Tr. 3260). The land around Whispering Ranch is being used for cattle grazing by the Federal Bureau of Land Management, four cattle per section. A section of land is 640 acres (Tr. 3261).

Another Wickenburg realtor, Bruce Summer, testified that he believes he has been on Whispering Ranch, both on horseback and four-wheel drive vehicle,but he cannot be certain because there are no stakes to identify the property (Tr. 3304). Mr. Summer's company, American Realty, has received numerous requests to list Whispering Ranch property and has taken two listings, only because he could not dissuade the people otherwise. The reasons for trying to dissuade the people from listing the property was, first of all,"no one could show it where it was. And I can't sell land I can't show" (Tr. 3306). Secondly, American Reality has no way of establishing a market value for the property (Tr. 3306). Mr. Summer has been in the real estate business since 1971, and no one has asked to buy Whispering Ranch property through him (Tr. 3303–07).

Sanders Solot, a real estate appraiser who testified for Horizon and appraised Whispering Ranch property and projected the future value of the property (Finding 115), was unable to locate any sales of Whispering Ranch properties which he could use in making his appraisal of that land. The few sales of Whispering Ranch properties he did locate involved "tax loss" transactions or exchanges of property, which did not represent market value transactions (Tr. 15688–89).

The land appraiser for Maricopa County found no resales of Whispering Ranch land in 1972 and 1975 at the time he appraised that property (Tr. 3623).

(6) *Arizona Sunsites*

128. As of August 2, 1975, Arizona Sunsites had a total of 22,116 lots of which 14,897 had been deeded, and 4,536 sold but not deeded, leaving Horizon owning 2,683 lots. These lots were platted as follows: 19,203 single family, 717 multi-family, 732 multi-family/commercial, 220 commercial and 1,244 bulk lots (CX 873G).

Frank Mangin, from the Economic Development Office of the Governor, testified that he had received no inquiry concerning industrial development in Arizona Sunsites. In his judgment the area lacks the first element for attracting industry, "a demonstrable labor supply" (Tr. 3401). He further testified that Arizona Sunsites

does not have sufficient population to support a significant retail sales infrastructure (Tr. 3406), and it lacks the medical facilities to support a substantial population of retired persons (Tr. 3472, 3397–99). **[243]**

Peter Fusco, a former Horizon employee, has been in the real estate business in Willcox, Arizona for ten years (Tr. 4023). His firm takes listings of all types of property in Cochise County, which includes Arizona Sunsites (Tr. 4023–24). He has received 6–700 inquiries about listing lots for sale in Arizona Sunsites. He has referred all such inquiries to brokers located in Sunsites, because the 10 percent commission he would receive would not make the effort worthwhile to him (Tr. 4026, 4032). He owns two lots in Sunsites, which he has been unable to sell (Tr. 4027–4039).

Albert Karnok, formerly employed by Horizon, has been a real estate broker since 1971 (Tr. 3958). He has lived in Sunsites 14 years (Tr. 3979). Mr. Karnok has accepted some listing in Sunsites; he has refused to list other property depending upon the locations (Tr. 3956). He does not list lots that are too distant from the "core" area (Tr. 3956–58). From 1971 to July 14, 1977, Mr. Karnok had listed approximately 195 lots (Tr. 3958).

From 1971 he has records of refusing to list 110 lots, not including telephone and walk-in inquiries that he refused to list (Tr. 3959). From 1971 to the date of his testimony, July 18, 1977, Mr. Karnok had made 56 sales embracing a total of 96 lots (Tr. 3959).

From at least 1972 to 1976, Mr. Karnok sent letters to persons who inquired about the resale of their lots in Sunsites. These letters indicated that there was little demand or resale market for lots in this property (CX 845A–F; Tr. 3960). In one 1976 letter, he indicated that even if a lot listed for $700 sold for that amount, the net amount to the seller would be no more than $510 after deducting the costs of sale; i.e., a 10 percent sales commission and title costs.

E. Customer Forfeitures

129. Horizon's contracts with its land customers provide that failure of the buyer to make payments according to the payment plan selected shall entitle Horizon to "retain all sums paid under this Agreement as liquidated damages" (CX 142, 143, *for example;* Ans., Par. 74). Horizon's policy generally is to cancel a land sales contract as follows:

Purchaser's Equity In Contract	Contract Cancelled When Delinquient
0% to 10%	3 payments
1% to 30%	4 payments
Over 30%	6 payments

(CX 61R, 62U).

Horizon has never taken any action against delinquent customers other than forfeiture of the property (CX 66B; Tr. 13455–57). However, Horizon did send delinquent customers "dunning" letters threatening legal action: "Should you fail to bring your contract current, we shall be compelled to place this matter in the hands of our attorney . . . Please save us—and yourself—from this embarassment" (CX 921D). **[244]**

130. Commissions were payable to the sales representatives who made a given sale. Commissions ranged from 7% to 11%, depending upon the percentage down payment, the length of the payout period, and whether the sales representative was a junior or senior sales representative (CX 159f). With the high average downpayment of 12% on sales (CX 67d), the weighted commission would be 8.2%. Tony Zimmer, a Horizon sales representative for over a year, testified that his commission was generally 8% of the gross amount of the sale (Tr. 6139). Commission overrides were also payable. Mr. Zimmer testified that his sales manager, Jerry Steer, received an override of 2% on sales which Mr.Zimmer made (Tr. 6152). Theodore Stone and Bernard Gelfand received ½% of the net sales in their respective zones (CX 775; Tr. 10376). Daniel Nickeson received overrides as a regional manager (Tr. 4500). Thus, total commissions and overrides from sales could range between 9.5 and 13.5%. Based on the average downpayment and the commission figures above, the total commissions and overrides were generally in the range of 10.5 to 11%.

Horizon's direct selling expenses included costs in addition to sales commission and override costs (*see, e.g.,* CX 921). Selling expense as a percent of sales was between 27.8% and 29.6% in fiscal 1968, with the percentage varying by property (CX 87A–B). The selling expense also varied in later years by property (CX 87A–B). In all cases, the selling expense was a greater percentage of the original sales price of the contract than the commission and override totals discussed above (CX 87A–B). Multiplying the direct sales expense percentage by the sales amounts for lots purchased in a property produces a total for direct selling expenses (Tr. 4293–96).

131. Accounts which were forfeited during the period January 1, 1968 through June 30, 1975 where the principal and interest collected exceeded the direct selling expense are shown below (Tr. 4297–98). The information set forth in this table shows separately

the principal and interest paid by customers, the total of such payments by customers, Horizon's direct selling expenses, and the net retention by Horizon—i.e., the difference between the total payments by the customer and Horizon's direct selling expenses. These figures were taken from CX 852A–Z124, and establish that Horizon retained $2,251,721 over its direct selling expense.

Fiscal Year Cancelled	Principal Paid	Interest Paid	Total	Direct Selling Expense	Net Retention
1968	74,330	30,850	$105,180	70,314	34,866
1969	201,708	77,708	279,076	168,380	110,696
1970	219,335	82,998	302,333	191,781	110,552
1971	353,980	128,662	482,642	314,063	168,579
1972	390,296	154,910	545,206	365,613	179,593
1973	717,577	311,573	1,029,150	668,011	363,139
1974	1,088,420	498,417	1,586,837	1,095,089	491,748
1975	1,503,212	665,341	2,168,553	1,374,005	794,548
Total:	$4,548,858	$1,950,119	$6,498,977	$4,247,256	$2,251,721

The above figures for fiscal 1968 do not include information for June 1, 1967 through December 31, 1967. This table has been taken from CPF 3.143 and 6.33. The information has not been audited by the administrative law judge, but is assumed to be approximately correct. **[245]**

Horizon's out-of-pocket costs for commissions and overrides for the cancellations reflected above were considerably lower than the direct selling expenses. For example, direct selling expenses for account 369–04045 shown on its printout of cancellations were $700.92. This amount representd 26.4% of the sales price of $2,655 for project 3 in fiscal 1969 when the sale was made (CX 852Z2, 87B). Deducting that amount from the principal and interest payments leaves a net retention of $113 (CX 852Z2). If, instead, a commission and override total of 11% is applied to the sales price, the amount is $292. Deducting this amount from the $814 paid by the customer leaves a balance of $522 retained by Horizon.

5,541 customer contracts were cancelled during fiscal 1974 (June 1, 1973 - May 31, 1974) with no refunds being made. This tabulation establishes that these customers paid in a total of $2,466,802. The defaults, or cancellations, by property are:

Property (CX 109Z24–25)	Payments on Principal	
Combined land in more than one property	$ 272,440	CX 854A–D

Paradise Hills	45,811	CX 854D–3
Horizon City	896,720	CX 854E–Z28
Rio	1,116,328	CX 854Z28–81
Whispering Ranch	40,776	CX 854Z81–82
Arizona Sunsites	60,995	CX 854Z82–85
Waterwood	33,732	CX 854Z85–86
Total	$2,466,802	

Many of the customers who defaulted also paid interest to Horizon which is not included above. For example, interest of $461 was paid on account number 205–0435 (CX 854D, 852Z50); $868 on account 394–72365 (CX 854X, 852Z52); and $1,723 on account 476–15931 (CX 854Z74, 852Z58).

Customers who defaulted were also responsible for the payment of taxes and HCIA fees, if any, on their lots prior to the time of their default (*e.g.*, CX 35j–k). Payment of these amounts and the loss of any income on the funds paid out increased the losses of the customers.

Horizon claims that it lost $7 million in each of 1973 and 1974 from cancelled sales (RPF 581, p. 356–57). Horizon cites CX 92E in support of this claim of a loss on cancelled contracts. This "loss" is merely an accounting entry made at the time of a contract cancellation to adjust entries which were made to sales and deferred profit at the time the original sale was made. An accurate statement of this accounting entry is found in Horizon's annual report:

> Upon cancellation of a contract receivable, the excess of the unpaid balance over recovered costs (land and improvement costs and recovered commissions) and deferred profit is charged to 'Loss on cancellations'. (CX 62U) **[246]**

Several customers who testified in this proceeding forfeited on their contracts. Burnice Carter forfeited on his lots after paying Horizon approximately $5100 (Tr. 944). J. D. Oliver forfeited on a Waterwood lot after making a downpayment and three monthly payments (Tr. 1044). Other customers who forfeited were Billy Miley (Tr. 1507–08), James Madget (Tr. 1412–13), David Krausse (Tr. 1777–78), John Mossman (Tr. 4868–69), Jose Medina (Tr. 5001–03), John Gothard (Tr. 6096–97), Grace Swanson (Tr. 16169), Elsie Colon (Tr. 16224–25), and James Devlin (Tr. 16627).

F. Tax Sales

132. In New Mexico, property on which a deliquency in taxes has occurred and remains delinquent for three years, will be deeded by the County to the State. The State holds the tax deed for one year to give the assessed owner an opportunity to redeem or repurchase the

property. After the one year period passes, the State may set the property for auction (Tr. 2697). The State seeks to recover delinquent taxes, interest and costs out of the proceeds if land is sold at auction. The excess, if any, over these amounts, may be obtained by the former owner (Tr. 2699–2700).

Tony Armjo, Manager of the Enforcement and Collections Division for the Property Tax Department, State of New Mexico, testified that the state had a backlog of some 26,000 tax deeds at one time. Mr. Armjo made a special effort to get rid of these tax deeds (Tr. 2712–13). CX 804A–Z68 is a listing of property in Valencia County which was placed at auction on April 16, 1974. This listing included over 300 lots located in Rio Grande Estates, a subdivision of Rio Communities (CX 804Z23–Z45, Z51–Z63). Horizon bought many of these lots at the auction (CX 804Z28–Z33, Z35–Z45, Z51–Z63; Tr. 2712).

CX 807 A–C is a buyer registration for a tax auction which was held in Valencia County on October 2, 1975. This exhibit (CX 807A) indicates that Horizon was assigned buyer's number 3. CX 808A–Z9 is a listing of the property placed at auction in Valencia County on October 2, 1975. The listing consists of 414 parcels of land and all but three are lots in Horizon's Rio Grande Estates in Rio Communities. Further, Horizon purchased many of these lots, apparently paying the minimum bid price set by the State. Mr. Armjo testified that he was informed by Horizon representatives on several occasions that Horizon would give a standing offer to bid the minimum bid on all Horizon properties if no one else bid on the property (Tr. 2756–57). These minimum prices at the auctions were substantially less than the price which the lot owners paid to Horizon. Single family lots in Rio Grande Estates were sold by Horizon for $200 in 1962, and in 1974 the lots were selling for $1400 (RX 1541B). Horizon was buying substantial numbers of these lots in 1975 at tax auctions for $100 or less (CX 804, 808).

G. Feasibility and Absorption Studies

133. It is a usual and desired procedure for developers or investors in real property to have economic feasibility studies and **[247]**population absorption studies made on property before they make investments, or before they commence development of the property. An economic feasibility study focuses on the economic return that can be expected if certain action that can be taken with property is taken. A population absorption study seeks to determine the number of persons that will settle in a property in each year and

the length of time it will take for property to be totally absorbed, totally placed in an end use (Tr. 4003–04, 6589). Professor Stevenson testified that banks and lenders require absorption analysis on property before they make loans (Tr. 6728–29). Feasibility studies and absorption studies were required on all New Town projects sponsored by the Department of Housing and Urban Development (Tr. 6908). Joseph Lusteck testified that feasibility studies and absorption studies are an essential tool for banks, investors and land developers (Tr. 7081–83), and that such studies are necessary to render an opinion on the investment quality of property (Tr. 7136). Jack Mann testified that an absorption study is necessary for an informed decision to be made respecting an investment (Tr. 7589).

Available evidence indicates that Horizon had no economic feasibility or absorption studies made prior to selling land to the public. Ben Southland of Gruen Associates, which planned various subdivisions of Horizon's properties, testified that he presumed Horizon had such studies, but that he never was shown any such study and his firm did no such study for Horizon (Tr. 4003–04, 4012). John Hegstrom, formerly a Vice-President and Chairman of Horizon's Pricing Committee (Tr. 4123–25), could not recall any study or analysis being used in connection with pricing recommendations covering any of Horizon's six properties (Tr. 4141–42). George Larsen, formerly a member of the Pricing Committee, confirmed that Horizon did not consider the timing of the end use of its land even though Horizon's president, Sidney Nelson, recognized the utility of this information in valuing land (Tr. 4255–59).

Marshall McIntyre, Horizon's Development Services Manager, testified that there were no Horizon studies; no study of sewage costs in any property (Tr. 4327–28), no study of availability of water for any property (Tr. 4330), no study of demand for housing in any property (Tr. 4331), no study of supply of housing in any property (Tr. 4332), no study of demand for industrial land in any property (Tr. 4333), no study of any kind specifically for Horizon property (Tr. 4334), no feasibility study (Tr. 4337), no investment potential study (Tr. 4338), no scientific tests (Tr. 4340), and no reassembly programs or studies (Tr. 4334).

H. Horizon's Officials Did Not Invest in Horizon Land

134. Horizon's officials, who were responsible for purveying to the public what was represented to be an excellent, risk-free investment, better than savings accounts, stocks or bonds, or life insurance, purchased no Horizon undeveloped land (Tr. 14057,

13769–70, 14629, 13452). Bill Cook, who started as a sales representative with Horizon in 1967 (Tr. 13512) and became Vice President of Sales [248]in 1970 (Tr. 13523), who earned $40,000 per year plus $100,000 per year in commissions as a Zone Manager and $150,000 per year as Vice President of Sales (Tr. 13664), owns one lot in Horizon City for which he paid "around $300, $400" (Tr. 13663). This lot was purchased during the time Mr. Cook was a sales representative (RX 1538D), as it was Horizon's policy to encourage sales representatives to purchase Horizon property (CX 103K; Tr. 8401, 4420).

I. Other Development Problems

(1) *Water Rights*

135. There was expert testimony in this proceeding that there is ample water available to develop Horizon's properties and that water resources can be obtained at reasonable costs (see RPF 268, pp. 179–80). However, there is other record evidence that water rights are difficult to obtain and are expensive (Tr. 16578). Professor Stevenson alluded to water problems at Horizon's Paradise Hills project. Paradise Hills Unit 1 was sold with a development commitment (Tr. 16724–25). Water lines are in, streets and roads are in, but there has been an extended and continuing controversy over water rights. The private utility serving Paradise Hills is unwilling to assume additional expense to open up the lots because of a lack of a "ready to service" charge being available (Tr. 6690–93, 6705). William Kelly, a former Horizon employee and presently a realtor in Paradise Hills, confirmed Professor Stevenson's testimony about Unit 1 (Tr. 16618).

William Kelly also testified that he owns six acres of undeveloped land in Paradise Hills. He has been informed by the utility that supplies water to Paradise Hills, that he will have to furnish water rights to the utility in order to get water service to this property (Tr. 16572–74). According to Mr. Kelly, Horizon was contractually obligated to furnish the water rights sufficient to supply water to the original 8500 acres in Paradise Hills, but Horizon has failed to honor its agreement (Tr. 16574–76, 16597–600). A water line goes by the front of Mr. Kelly's property, but he cannot be placed on water service until the utility receives the necessary water rights (Tr. 16576–77). Mr. Kelly has been informed that water rights for his property will cost $60–70,000 (Tr. 16578). According to Mr. Kelly, several other persons in Paradise Hills have been denied water service for the same reasons (Tr. 16600).

Additional evidence received during surrebuttal hearings confirmed Mr. Kelly's testimony. On August 23, 1978, Mr. Kelly received a letter from H. Frank Metzler, Vice President, Paradise Community Services, Inc., the private utility authorized to provide water services to Paradise Hills (CX 1000A). The letter stated that the utility, with the permission of the New Mexico State Engineer, is actually diverting more water than its consumptive rights permit. This is a temporary situation, and in the near future the utility will be called upon to curtail pumping or acquire additional water rights. The utility is therefore requiring each developer to provide **[249]** water rights equal to the estimated usage of the proposed development. The letter stated that Horizon has refused to supply additional water rights to the utility and presumably has rescinded the agreement between Horizon and the utility. Since Horizon will not supply additional water rights, the utility looks to each developer to provide water rights necessary to service the proposed development. The letter noted that although there may be an agreement or obligation between the original seller [Horizon] and a buyer, someone will have to provide water rights before the utility will provide water service to Mr. Kelly's Paradise Hills property.

In New Mexico, water rights are severable from the land and can be sold or purchased. It is a property right. The place of use of and point of diversion of the water can be transferred. Water rights are usually referred to in terms of acre feet of water. Water rights can be acquired in perpetuity (Tr. 15540–41). The cost of water rights is in dispute and cannot be resolved on this record (see Tr. 16578, 15540; RPF 268, p. 180). Mr. Kelly contends water rights are expensive; Horizon contends such costs are "reasonable".

The Water System Agreement between Horizon and Paradise Services, dated January 14, 1961, is in the record (RX 1593). The agreement provided that Horizon will provide water rights to Paradise Services at the time they are needed, provided, however, that if such request is made after 3,000 houses have been connected to the water system, or 6,000 acre feet of water has been purchased by Horizon and transferred to Paradise Services, or twenty years shall have elapsed from the date of the agreement, Horizon shall have no duty to purchase and transfer additional water rights to Paradise Services (RX 1593H, I).

The area of land covered by the agreement between Horizon and Paradise Services covers 8500 acres of the Paradise Hills project (RX 1593T; Tr. 16712). Mr. Kelly's property is part of the 8500 acre tract (Tr. 16729, 16574); 3,000 homes have not been built in Paradise Hills

(Tr. 16729); and 6,000 acre feet of water is not being used (Tr. 16599, 16711).

At surrebuttal hearings Horizon offered testimony and letters concerning water rights at Paradise Hills. RX 1594 is a letter dated September 8, 1978, from the President of Paradise Services stating that Horizon has fulfilled its obligation as to water rights under the 1961 agreement. RX 1595 is a letter from Sidney Nelson, President of Horizon, to Mr. Kelly dated September 8, 1978, stating that Horizon has fulfilled all its obligations to furnish water rights to Paradise Services. Horizon offered testimony by Leonard Steele, Horizon's Vice President for Development, that Horizon has provided the utility with "sufficient" water rights to service Paradise Hills, and Horizon owes the utility no additional water rights (Tr. 16713–17). Mr. Steele admitted, however, that the determination as to the amount of water rights necessary to supply Paradise Hills is made by the State Engineer, and if the State Engineer determined additional rights are necessary, Horizon would have to supply them (Tr. 16730–32). **[250]**

Thus, Horizon contends "sufficient" water rights have been furnished Paradise Services, and Paradise Services contends additional water rights must be furnished to it. The position of the State Engineer is not known by direct, reliable evidence. A determination as to the ultimate responsibility for furnishing water service to Mr. Kelly's property need not be made in this proceeding. The relevance of Mr. Kelly's water rights problem is a dramatic demonstration of risks involved in the development of lots in Horizon's properties now and 30 years or more in the future.

(2) *Utility Costs*

136. Horizon's lots were all sold on the representation they would be contained within a fully developed community, with paved streets and city utilities. They were not sold or purchased with the understanding that individual lots would be developed separately, with rural or semi-rural facilities (Tr. 8751–54). The record establishes that it is not economically feasible or practical to develop a single lot in the Horizon projects. Bernard Gelfand, a regional sales manager for Horizon for Paradise Hills and Rio Communities (Tr. 10235–36, 10290), at present sells developed lots to builders (Tr. 10291). He testified that a builder needs a "cluster" of lots before development can be feasible—"You cannot develop one lot at a time" (Tr. 10298, 10303). Leonard Steele, Horizon's Vice President for

Development, testified that it does not make economic sense to attempt to develop one lot in a large subdivision:

Q. Is there a reason for just why it does not happen that way?

A. Well, two reasons. The cost would break the developer and the utility company would fight it tooth and nail, because they don't want that kind of a capital asset out there taxed to provide the revenue from one meter. Just won't happen (Tr. 13976).

Horizon City lot owners are not permitted to use individual wells for a water supply (CX 35P–Q, 36 O–P). Leonard Steele testified that water underneath Horizon City lots is deeper than in other Horizon properties and in some areas of Horizon City the water is brackish and unsuitable for drinking purposes (Tr. 14021). This will require the physical transportation of water to the Horizon City premises from a distant location and this will be expensive (Tr. 14021, 15536–39).

Rio del Oro lot owners are not permitted to use individual wells for a water supply (CX 10M). Horizon has acquired water rights to service only the existing development area and five years anticipated growth, a population estimated to be 10,000 people (CX 10M). This water supply would not be adequate to serve the core areas retained by Horizon if fully developed (see Finding 85–86). Septic tank use **[251]**in Rio del Oro is subject to the granting of a variance because most lots are below the minimum size required. An increase in that minimum by local authorities, apparently after the lots were planned by Gruen Associates and subdivided by Horizon made the lots too small (*e.g.,* CX 10N–O, 11N–O).

Charles Campbell, a well driller located in Wickenberg, Arizona, near Whispering Ranch, testified that he had not drilled a well on Whispering Ranch. In his opinion, however, water wells on that property would range from 200 feet to 1000 feet and would cost an average of $4000, plus cost of a pump which would range from $500 to $1200 [1977 prices] (Tr. 3293–96, 32810).

Peter Fusco, a realtor in Willcox, Arizona near Arizona Sunsites, testified that the cost of drilling is $10 per foot for a domestic well, and he had determined that the average well in Arizona Sunsites was 350 to 500 feet, depending upon the water table and where you are drilling. When he sells property as a realtor he must tell prospective buyers about the electricity 2 miles away (Tr. 4030), and the need for a well and septic tank. These items add $15,000 to the cost of the land. "It is up to the individual. He may say yes, I'll go along and he may not. The majority of them will not because it is just an exorbitant amount of money in comparison to the cost of the land. The land is the cheapest of the deal" (Tr. 4030–31, 4032).

Charges for electricity, sewer and telephone would likewise make development of an individual lot economically unfeasible. As of May, 1975, costs for utilities to the most remote lots within the various subdivisions of Rio Communities then being offered for sale could be as great as the following amounts:

Electricity		$142,500 (CX 11n)
Water	– extension of line	$340,000 (CX 11n)
	– drilling well	$ 12,500 (CX 10m, 11m)
Gas	– lines not available, use bottled gas instead; $500 for storage facilities (CX 12n)	
Telephone	– line	$165,000 (CX 12n–o)
	– radio telephone	$ 2,500 (CX 12n–o)
Sewage	– septic tank	$350–600 (CX 10–o)

Similar substantial expenses would be applicable to Horizon City lots (CX 35P–S, 36 O–R; Tr. 2449–96). Lawrence Mattison, engineering supervisor for the Western division of the Arizona Public Service Co., testified that to get electricity out of Wickenberg toward Whispering Ranch, an over-head, single-phase electric line would cost about $10,000 a mile; also, since the area involves difficult terrain, they would probably have to add 25–30 percent to that figure (Tr. 3567). Electric lines are now within three miles of the Whispering Ranch boundary (Tr. 3565). **[252]**

Horizon's federal property reports make it clear that there is no utility service of any kind outside the development areas of Horizon's projects and no provisions have been made to provide such services. CX 35P, a federal property report for Horizon City, states that there is no assurance the El Paso County Water Authority will be able to finance extensions of the water system and therefore water may never be available to the lots. Likewise, there is no assurance that line extensions will occur at any particular time (CX 35P). The owner of a lot must make arrangements for sewage, electricity, gas, and telephone (CX 35R–S). Drainage ditches will be constructed as part of the bladed road system but will not be maintained (CX 35 O). Horizon has agreed to construct bladed and graded twenty-four foot roads with drainage ditches, but no money has been escrowed to assure completion of the roads and there is no commitment to maintain the roads (CX 35 O).

The Rio del Oro federal property reports state that Horizon has made no arrangements for the extension of water, sewage disposal, electric, telephone or gas service (CX 10L). The road commitment in Rio del Oro is similar to the Horizon City commitment (CX 10K).

J. Initial Cost Of Land To Horizon

137. Horizon purchased land for its Rio Communities project at the following cost per acre (CX 131C):

Date	Acreage	Per Acre Price
1–9–60	106,000	$ 9.91
11–1–68	47,092	99.81
7–23–69	11,810	64.08
7–20–72	84,000	81.08

Average price per acre $53.78

By contrast, all of Rio del Oro except for the core areas, was subdivided into quarter acre lots (10,000 square feet), some 82,918 lots (RX 1539a, 1540). These lots were sold at per lot prices commencing in 1970 of $800 to $8800. In 1972 lots in Rio del Oro were sold at the following prices (RX 1541H, I):

Number Of Lots	*Price Per Lot*	*Total Sales Price*
4359	$ 800	$ 3,487,200
402	2500	1,005,000
83	4300	356,900
3611	900	3,249,900
397	2800	1,111,600
100	5200	520,000
1574	1100	1,731,400
255	3400	867,000 [253]
96	5800	556,800
1454	1300	1,890,200
91	4300	391,300
70	6100	427,000
12,492		$15,594,300

Average Price Per Lot: $1248.34
Average Price Per Acre: $4993.36

Horizon purchased land for its Horizon City project at the following cost per acre (CX 131C):

Date	*Size (Acres)*	*Per Acre Price*
12–31–59	62,443	$ 80.07
6–16–69	19,428	346.81
5–20–69	5,702	–0– (Exchange with the state)
5–27–68	1,241	125.00
11–10–69	1,230	100.00
Totals	90,044	$133.45

Horizon City Estates contains 44,200 lots; 10,000 square feet per lot, or approximately one-quarter acre in size (CX 118; RX 1536A). Sales of these lots commenced in 1970 at $1000 per lot (RX 1538F). In 1972 these lots were sold at the following prices (CX 1538F):

Number Of Lots	*Price Per Lot*	*Total Sales Price*
4593	$1300	$ 5,970,900
419	3800	1,592,200
107	8000	856,000
2990	1100	3,289,000
425	3200	1,360,000
85	6600	561,000
8619		$13,629,100

Average Price Per Lot: $1581.29
Average Price Per Acre: $6325.08

Whispering Ranch property was purchased at the following price per acre (CX 131G): **[254]**

Date	*Acreage*	*Per Acre Price*
1–5–62	16,624	$150.00
7–1–67	2,560	135.00

Average price per acre $148.00

Whispering Ranch 5-acre parcels sold for $1900 in 1964 to $5300 in 1975. The most substantial number of lots in Whispering Ranch sold for prices of $3100 to $4000 (RX 1544B). The average selling price per acre would approximate $700.

V. Conclusions

A. Summary

O, What a tangled web we weave, When first we practice to deceive![7] Sir Walter Scott.

Shakespeare said "Brevity is the soul of wit."[8] If this is true, this decision is lacking in wit. The complaint consists of eighty-eight paragraphs which comprise thirty-six separate allegations of unfair or deceptive conduct in the sale of land in six properties; the general denial answer sets forth thirty-two defenses. The record has nearly 17,000 pages of transcript, approximately 2,500 exhibits, most all of which are multi-paged, and the proposed findings and briefs exceed 1,000 pages. To analyze such a massive record has been not only time-consuming, but has required lengthy and detailed findings of fact to chart a clear path through a complex sales scheme accompanied with an aggregation of deception and misrepresentation. Nor was the course marked by the briefings of the parties, which were often too general, too biased, and too immaterial to be helpful. Complaint counsel failed to offer proof as to some allegations of the complaint and presented insubstantial support for other allegations, yet did not specifically abandon any complaint allegations. Some allegations which are not supported as charged in the complaint, constitute evidence material to and supportative of other allegations. In sum, substantial effort has been made to deliver an opinion that, although lengthy, will be useful to the Commission in its consideration of this matter.

Horizon's advertising and sales practices were part of a total scheme to sell land in which the pervasive theme was Horizon land as an excellent, risk-free investment. Although Horizon did reveal certain information about the undeveloped nature of its land, one must unravel a tangled web of deception to find these revelations, which can hardly be termed disclosures. Certainly these statements did not apprise the public of the true nature of the investment. The public was lulled into believing the excellent investment theme by artful and repeated representations that land is the best investment, that Horizon is a successful community builder with thousands of happy customers, and that their lots were in areas soon to be developed. **[255]**Horizon's representations, where not in the form of bold assertions, were fashioned out of exaggeration, innuendo, ambiguity, half-truths, and the omission of material facts. Although many of the statements Horizon made were in and of themselves

[7] Marmion IV, Stanza 17.

[8] Hamlet, Act II, Scene 2, Line 90.

true, the total impression rendered by their combined use was one of misrepresentation and deception.

It is a long-established principle that "[W]ords and sentences may be literally and technically true and yet framed in such a setting as to mislead or deceive." *Bockenstette* v. *F.T.C.* 134 F.2d 369, 371 (10th Cir. 1943). This principle has been followed in numerous cases. Thus, in *P. Lorillard Co.* v. *F.T.C.,* 186 F.2d52, 58 (4th Cir. 1950), the court declared:

> To tell less than the whole is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.
>
> In determining whether or not advertising is false or misleading within the meaning of the statute, regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might be reasonably be expected to have upon the general public.

See also, *Sebrone Co.* v. *F.T.C.,* 135 F.2d 676, 679 (7th Cir. 1943); *Rothschild* v. *F.T.C.,* 200 F.2d 39, 42 (7th Cir. 1952); *Bennett* v. *F.T.C.,* 200 F.2d 362, 363 (D.C. Cir. 1952); *Koch* v. *F.T.C.,* 206 F.2d 311, 317 (6th Cir. 1953); *Rhodes Pharmacal Co.* v. *F.T.C.,* 208 F.2d 382, 387 (7th Cir. 1953), modified in part on other grounds *per curiam,* 348 U.S. 940 (1955); *Feil* v. *F.T.C.,* 285 F.2d 879, 896 (9th Cir. 1960).

Another formulation of this basic principle, first advanced in *Bakers Franchise Corp.* v. *F.T.C.,* 302 F.2d 258,261 (3d Cir. 1962) (citing *Rhodes Pharmacal* and *Koch*), is "that deception may be accomplished by innuendo rather than by outright false statements." And see *Regina Corp.* v. *F.T.C.,* 322 F.2d 765, 768 (3d Cir. 1963) (citing *Bakers Franchise*). This formulation was also followd in *National Bakers Services, Inc.* v. *F.T.C.,* 329 F.2d 365, 367 (7th Cir. 1964).

The failure to disclose material information has been condemned for many years as an unfair and deceptive practice. *The Raymond Lee Organization, Inc.,* Docket 9045, Opinion of the Commission, p. 48 [92 F.T.C. 489] (November 1, 1978), *citing Portwood* v. *F.T.C.,* 418 F.2d 419, 424 (10th Cir. 1969); *J. B. Williams Co.* v. *F.T.C.,* 381 F.2d 884, 891 (6th Cir. 1967); *Waltham Watch Co.* v. *F.T.C.,* 318 F.2d 28, 32 (7th Cir. 1963), *cert. denied,* 375 U.S. 944 (1963); *Keele Hair and Scalp Specialist, Inc.* v. *F.T.C.,* 275 F.2d 18, 23 (5th Cir. 1960). **[256]**

It is concluded that Horizon's undeveloped lots were not excellent investments with little or no risk involved; Horizon's lots were, in fact, bad investments with little or no potential for profit (Finding 101–136). Therefore, all statements and representations that Horizon's undeveloped lots were excellent investments, and all statements and representations that created implications that the lots

were excellent investments were false, deceptive, and misleading. In making this determination, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. See *Beneficial Corp.* v. *F.T.C.,* 542 F.2d 611, 617–18 (3rd Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); *Continental Wax Corp.* v. *F.T.C.,* 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc.* v. *F.T.C.,* 329 F.2d at 367; *Charles of the Ritz Distrib. Corp.* v. *F.T.C.,* 143 F.2d 676, 679 (2nd Cir. 1944).

B. Horizon's Undeveloped Properties Were Represented To Be Excellent Investments With Little Or No Risks

Counts I and II of the complaint allege that Horizon's lots offered for sale were represented to be excellent investments at the prices offered with little or no financial risk involved, whereas in a substantial number of instances the lots were not excellent investments involving little or no risk. It is further alleged that Horizon failed to disclose material characteristics of the lots in that the lots were risky investments because (1) their future value was uncertain, and (2) purchasers probably would be unable to sell the lots at or above the purchase price. These are the key allegations of the complaint and they have been established by overwhelming evidence.

Horizon's sales program was bottomed on representations that money could be made, that financial security could be assured through the purchase of Horizon land. Horizon's basic theme of the substantial profits to be made in risk-free purchases of its land permeated its entire sales effort, its national advertising, its brochures and presentation manuals, its celebrity films, and the oral sales presentations by hundreds of sales representatives at "dinner parties" and in the home. Sales presentations were designed around a concept referred to by one Horizon zone manager as "funnelling"; land was presented as the best investment; the Southwest as the fastest growing area in the United States; Horizon as a New York Stock Exchange company and a community builder with technical skills, millions of dollars in assets, and thousands of happy customers; the location of Horizon's projects near fast-growing metropolitan centers in the Southwest—El Paso, Houston, Dallas, Albuquerque, Phoenix and Tucson; the specific Horizon projects located directly in the locked-in growth pattern of these metropolitan areas; the individual units within the predeveloped projects with predesignated

locations for schools, parks, commercial and recreational areas; and finally, the specific preselected lots within the unit, which were the ultimate focus of the sales presentation (Finding 39). **[257]**

This sales technique was highly successful. As of August 1975, Horizon had sold 277,890 lots (CX 873J). For the five year period June 1, 1969 to May 31, 1974, Horizon's sales of undeveloped land totaled $369,740,000 (Finding 23).

The outstanding success of Horizon's sales efforts is even more astonishing when one appreciates that the land was sold sight unseen—to thousands of persons. One Horizon zone manager, who came to Horizon from a real estate background in housing sales, testified that he had doubts as to how land could be successfully marketed sight unseen. When he began his employment with the company, it was explained to him that there was a correct way to present the land to accomplish a successful sales program—it was to activate the "greed" in everyone:

> The emphasis was put on the financial security, the profit, the money that one would make by purchasing this land (Tr. 1922–23).

General representations about land as an excellent investment, and Horizon land in particular, were made in national advertising, which also portrayed Horizon as a financially sound community developer (Findings 42–43). One national advertisement stated:

> Horizon Creating Opportunities
>
> Horizon Corporation, one of the nation's leading land developers, selects large parcels of land strategically located in the path of people and progress. On this choice property, we plan and create exciting new communities such as Paradise Hills and Rio Grande Estates in New Mexico; Arizona Sunsites; and Horizon City, Texas. It is almost inevitable that this land will rise in value as the population there increases, and as the population of big growth cities like Albuquerque and El Paso expand outward toward them.
>
> We believe that we can prove to you that there is no other investment as good as land. Even a little bit can go a long way to patch up your future dollars. (CX 274).

These national advertisements offered free booklets, such as "Make Money in Land, A Guide to Successful Investment" (CX 454). Another advertisement, emphasizing that land is only as good as the company you buy it from, stated that Horizon had $150 million in assets, a net worth of $60 million and an inventory of land value of $240 million (CX 352).

These themes about the opportunity to make money with Horizon land were carried out in sales training manuals (Finding 44), in the presentation manuals which were used for in-home sales presenta-

tions (Finding 45), and in the celebrity films used at dinner parties and in the home (Finding 46).

In addition to the written and oral representations about land in general, Horizon land in particular, the general financial [258] trustworthiness of Horizon, and its reputation as an experienced developer of new communities, visual scenes of the beauty of the Southwest and of Horizon's communities were very much a standard part of every sales presentation. The presentation manuals used in the home, and the celebrity films shown at all dinner parties and at some in-home sales presentations, have many beautiful scenes of the Southwest and of Horizon's communities (CX 194–97, 526–27). On property visits and fly-in tours, customers were shown through the developed core areas where there were homes, golf courses and other attractive amenities (Finding 67). Purchasers were led to believe that the property they were purchasing would soon be part of such a beautiful community in the Southwest. These general representations attracted the attention of the prospects and gave assurances of the reliability of the company; specific representations about profitability provided the final enticement resulting in sales of the property.

Sales representatives were trained to represent to the prospects that land was the best of all investments; specifically, land was represented to be the best hedge against inflation, superior to savings accounts, stocks and bonds and life insurance (Finding 49). Since land was represented to be the investment superior to all others (CX 778Z10), it is not surprising that sales presentations stated affirmatively that the purchase of land was risk-free, or the sales presentations were devoid of any mention of risks (Finding 52).

There was wide use of Federal Housing Administration statistics by sales representatives, pursuant to their training, to demonstrate to prospects that land had appreciated at a 20 percent per annum compounded rate between 1946 and 1968 (Finding 51). Sales representatives used these statistics to represent generally that Horizon's land would increase in value at this 20 percent rate in the future. Horizon also trained its sales representatives to cite specific examples of extraordinary profits that had been made in the past on land in the United States, especially examples of tremendous profits that had been made on land in the locality where the sales presentation was being made. Some of the examples cited by sales representatives were about substantial profits that had been made on land purchased from Horizon (Findings 50, 54–55).

A most effective sales technique, widely used by sales representatives, was the price increases which Horizon periodically initiated on

its undeveloped lots. Sales representatives used these price increases constantly and systematically to demonstrate to prospects that the lots had appreciated in value over the past years and could be expected to continue to increase in value in the future (Findings 71, 68). Sales representatives exerted immediate purchase pressure by leading prospects to believe that a price increase on Horizon land was imminent, or that the lots might not be available at a later date, or might not be available at the price being offered, to spur the prospect to make an immediate purchase (Finding 72).

The most significant representations made by sales representatives concerned the amount of appreciation a prospective purchaser could expect on the property, the time frame within which this appreciation could be **[259]**realized, and the ease with which the property could be resold.[9] Individual sales representatives used different time frames and different rates of appreciation over the years. Detailed findings about these extremely significant representations have been made (Findings 53–60), and the evidence manifestly establishes that there was a continuing sales practice to represent, directly or by implication, that substantial appreciation would be realized on purchases of Horizon land within a relatively short time span, and that resale of the property would be accomplished without difficulty.

The time in which an appreciation in the price of Horizon's land could be realized was generally stated by sales representatives to be three to five years during the period 1968 to 1970. The time period later was changed to seven to 10 years, and there is some indication that more than 10 years was used by sales representatives. As the time period approached 20 years, customer resistance was evident, as was sales representatives' reluctance to use such a lengthy time frame.

In 1973, Sidney Nelson, President of Horizon, distributed the "Principles of Land Ownership," which indicated that undeveloped land lacks liquidity, that there is some uncertainty as to appreciation rates and time frames for profitability of undeveloped land, and that Horizon sales representatives should be guided accordingly (Finding 57). These principles, purported to govern sales of Horizon's property, were not used by sales representatives, and had virtually no effect on sales presentations to purchasers.

Realizing that representations concerning rates of appreciation and time frames were material to purchasers, Horizon trained sales

[9] In 1973 and 1974, Horizon changed its Agreement for Deed, Receipt of Deposit, and Property Visit Credit Certificate to have the buyer acknowledge that no guarantee of appreciation, resale or repurchase had been given and that Horizon provided no resale services (Finding 64), an indication of Horizon's recognition of the materiality of these questions to a decision to purchase its land.

representatives in various sales techniques which were utilized to avoid having to make an outright representation in this area. Sales presentations were designed to use the FHA statistics, examples of increases in other land in the past, and price increases on Horizon land to show appreciation on land. From these examples, the prospect was led to draw his own conclusion that the property would increase in value in the future (see Tr. 11498–500, 1862–63, 1866–67, 1873–74, 2184–85, 3510, 3553, 4792).

Another approach to the question of how much appreciation could be expected and in what time frame, was for the sales representatives to answer any questions by stating that they did not have a "crystal ball," and then refer the prospect to examples of property value increases in the past. This answer was widely used by sales representatives and was suggested in the training manuals (CX 180S).

The record demonstrates that Horizon knew that specific representations about substantial price appreciation within a short-term were being made by sales representatives, and that implications of **[260]**substantial short-term profitability were being intentionally created by sales representatives. This is conclusively demonstrated by Horizon's internal surveys of its sales offices (Findings 89–100). For example, the conclusion of the March 1974 survey of the Dallas office found an "alarmingly high percentage of misrepresentations to customers" (CX 950B).[10]

A survey of the Denver office in 1974 revealed serious misrepresentations concerning the number of years property must be held to be sold at a profit. The survey found misrepresentations as follows: 1968–1970 - four years maximum; 1971 - three to five years and five to seven years; 1972 - eight years maximum with shorter projections close to development area; 1973 - ten years maximum with shorter projections close to development area (CX 927L, M).[11]

The 1974 survey of the Seattle office found misrepresentations which required cancellations or adjustments to contracts of 80 customers resulting in reductions of approximately $500,000 (CX 944C).

Misrepresentation was not limited to a special group of a few salesmen nor to a particular time span. It appears as though new hired sales representatives were

[10] Joe Mills (February 1972 - September 1973 employment in the Dallas office) sold $613,000 in sales contracts using representations that he would personally negotiate resale of the property for the purchasers and that high profits could be realized within two years from the date of purchase. Another sales representative accompanied Joe Mills on these sales transactions and shared in the commissions from the sales (CX 950E, G).

[11] Sales representative Bill Van Sickle (1971 employment in the Northglen, Colorado office) was found by Horizon's internal surveys to have sold 65 contracts (approximately $140,000) of Rio del Oro property using 3–5 years profitability projections. Further, this was "standard training" for sales representatives in that office (CX 927M).

intentionally trained from the start of their careers to misrepresent Horizon properties. The standard dinner party presentation itself was extremely over-optimistic in its projections if not directly in violation of Horizon policy (CX 944Y).

The 1974 survey of the Chicago office found that:

The Chicago office is not selling a long term asset. What is being sold is a short term investment opportunity ranging from 4 to 12 years to maturity depending on property type and location (CX 951E).

Horizon's internal surveys revealed that where no "gross misrepresentations" were made, definite implications were very much a part of the sales presentation. The May 1975 survey of the Washington, D.C. office reported:

In conversation with the individual customers, I discovered no instances of direct "gross [261]misrepresentation." The customers were given no written or oral, personal or corporate, promises or guarantees, per se, on any topic of presentation. Indeed, in my experience nationally, I find sales presentations seldom involve such direct statements. However, when one's consideration moves beyond direct statements to the realm of "implications," the analysis and evaluation of the sales presentation becomes far more complicated. Washington, D.C. sales presentations do involve questionable implications or assurances on such topics as risk, appreciation, marketability or liquidity, time to development or term of investment and quality of investment (CX 938C).

Information about the manner or method by which the Horizon property could be resold by the customer to liquidate his asset was not part of the affirmative sales presentation. Training manuals prior to 1971 were silent as to representations that were to be made regarding methods of resale. Commencing in 1971 or thereabouts, sales representatives were instructed that Horizon's policy was that it would not resell or buy back a customer's property, and sales representatives should not make representations contrary to this policy (Finding 61, pp. 70–71). However, sales representatives were also trained that Horizon would "assist" a customer in the resale of the Horizon property (Tr. 6163–64),[12] and that Horizon was going to establish a resale office in the future, which would be in operation by the time the customer wished to resell his property.

In disregard of what was purported to be Horizon's official policy, sales representatives made specific representations that Horizon would resell the customers' property or buy it back, or would assist the customer in the resale of the property. In some instances the assistance to be offered to customers was intentionally left vague by

[12] The "assistance" furnished customers consisted of supplying the customer with sample newspaper advertisements which the customer could use, or giving the customer names of real estate brokers. This "limited" assistance was not explained to customers at the time of the sale,leaving customers to assume the assistance would involve Horizon's direct participation in resale of the property.

the sales representatives. Some sale representatives promised to personally assist in the resale of the property.[13] Where specific representations regarding the assistance that would be given by Horizon were not stated, customers were assured that there would be no difficulty whatsoever in the resale of the property; it could be resold by real estate brokers the same as any other property. Testimony by former sales representatives and by customers attests to the fact that these resale representations were made by sales representatives in their sales presentations and that they were material to the customers' decision to purchase Horizon land (Finding 61, pp. 70–77). **[262]**

Horizon's internal surveys confirm that misrepresentations were made concerning Horizon's role in the resale of Horizon property.[14] The conclusion reached after the completion of a survey of the Denver office was that:

> Our resale policy was vague among the majority of the customers. Most customers believe that they will be contacted directly by a purchaser at time of demand. They do not foresee taking positive steps themselves. Horizon's obligation in this function plays a variety of roles but we seldom heard that Horizon Corporation accepted full responsibility for resale of owners' property (CX 927N).

Other representations were made, directly or by implication, which depicted Horizon's lots as excellent investments. The federal property reports were used as a sales aid to imply federal approval of Horizon and its property (Finding 77). The property was presented as preplanned or predeveloped, where opportunity for appreciation in land values is greatest (CX 172Z38). The unit maps, used in all sales presentations, showed the lots to be in self-contained developments with streets, recreational areas and school sites planned and ready for development (Finding 78).The community improvement associations - HCIA's - were represented to insure or contribute to the attractive development of the property. The availability of utilities was never mentioned as constituting any problem. The implication created was that utilities would be available, whether furnished by Horizon, or the HCIA, or the "developer" was never made clear (Findings 81–83). The locked-in growth of Albuquerque and El Paso was stressed in every presentation of Rio Communities and Horizon City properties as assuring short-term development of those properties (Findings 73–76). The growth direction of Phoenix to the Northwest towards Whispering Ranch, and the scarcity of private land in Arizona available for development, was part of the sales

[13] See fn. 10 *supra*.

[14] See, for example, footnote 10 *supra*.

presentations of Whispering Ranch property and assured its future development (Finding 88).

Horizon's sales representatives used property locations and designations to represent that lots would be profitably developed in the future. Locations near proposed highways and highway loops, schools or university site, shopping centers, recreational areas and cul-de-sacs were stressed (Findings 69–70). Multi-family, commercial, and bulk acreage properties were represented as offering greater profitability for purchasers, and these more expensive properties were used in reloading sales where the purchaser's property investment was "upgraded" by the sales representatives (Finding 68). Locations close-in to the development areas, or to satellite areas, were used to assure customers that the property would develop quickly and profitably, and also as "trades" in reloading sales and for customers expressing dissatisfaction with their initial property location.

The property visit credit, the exchange privilege, and the Horizon guarantee were further benefits which assured the purchaser that the property was an excellent investment. The customer could get a 5 percent credit toward the purchase price of the lot at the time of the **[263]**property visit, and if dissatisfied with the lot, it could be exchanged for other property. The Horizon guarantee assured the purchaser that the property had not been misrepresented, and if found to be misrepresented at the time of the property visit, all monies would be refunded. This guarantee was sometimes misrepresented and sometimes left intentionally vague, implying the return of all monies paid in if the purchaser were in any way dissatisfied with the property (Findings 63–67). For that rare customer who wished to build a home in the Horizon properties, there was the opportunity to exchange the undeveloped lot for a building lot in the core area. Thus, the customer was assured the property was an excellent investment with no risks involved.

Finally, the celebrity films narrated by Merv Griffin and Leif Erickson had both celebrities endorsing Horizon land as being an excellent investment. To forcefully demonstrate their endorsement of the Horizon property, each celebrity stressed his personal ownership of Horizon land (Finding 87).

Horizon contends, however, that it did not represent its land to be an "excellent" investment, that no sales representative who testified for complaint counsel testified that he was trained or did represent the land as an "excellent" investment. Horizon further argues that complaint counsel offered no expert opinion as to the definition of an "excellent" investment, but that Horizon did offer such an opinion

through its expert, Alan Nevin, who testified that an excellent investment must have "a high guaranteed tax shelter, cash flow, substantial equity built up, tremendous tax shelter, guaranteed high level of appreciation probably 15 to 20 percent or more and be risk free" (Tr. 15955). Horizon contends that where there is uncertainty as to time of resale or as to a minimum level of appreciation, the purchase cannot be considered an excellent investment with little or no risk (RPF 134–36, pp. 78–80; RRB, pp. 62–63). Horizon contends its land was represented as being a desirable investment with discretionary assets over a long-term, or a desirable expenditure of discretionary funds for future use or for long-term potential appreciation (RPF 137, pp. 80–81).

It is the message conveyed or the implication created in the mind of the ordinary purchaser that is of concern in this proceeding, not whether the representations fit precisely into the mold of an excellent investment created by a sophisticated realty investment expert. The word "excellent" has a dictionary meaning of "superior, very good of its kind; imminently [sic] good; first-class." *Webster's Seventh New Collegiate Dictionary,* 1969. Horizon, in almost every conceivable way short of an absolute guarantee, represented its land to be an excellent investment, better than savings accounts, stocks and bonds, and insurance, and risk free. Representations were also made that the property would appreciate at a 20 percent compounded rate and be easily resold in a short term. Thus, it is concluded that Horizon represented its land to be a superior investment, imminently [sic] good, first class, indeed, an excellent investment. As the Commission recently stated in *The Raymond Lee Organization, Inc.,* Docket 9045, the law is not made for the protection of experts but for the public who may be governed by appearances and general impressions. (Opinion of the Commission, p. 25) [92 F.T.C. 489]. Beyond any doubt, Horizon created the impression that its properties were excellent investments.

C. Misrepresentations, Deceptions, And Failure To Disclose Material Information About Horizon's Land [264]

Many of the representations which Horizon made about its land were outright falsehoods; other representations consisted of partial truths, or literal or technical truths, framed in a setting to mislead or deceive. Horizon also failed to disclose material information about its land to purchasers. In several respects, Horizon's sales techniques left material issues vague. The record herein reveals widespread confusion and a lack of understanding about critical elements of

Horizon's property and Horizon's obligations, all conducive to Horizon's objectives.

All the representations about time frames to profitability and percentages or amount of appreciation or profit which could be expected to be realized on Horizon lands were false and deceptive. Horizon had no basis for making any projections concerning time frames or profitability since no feasibility or absorption studies had been prepared on any of its property (Finding 133). Other representations which sales representatives were trained to give, and which were given to many purchasers, to the effect that sales representatives were unable to make a projection into the future, or that the sales representatives did not have a "crystal ball," were false and deceptive for they were made in the context that all land appreciates in value, that land appreciates at a 20 percent annual compounded rate, that Horizon's land has appreciated in value in the past, that Horizon's land is located in the locked-in growth pattern of growing cities, thus creating the implication that Horizon's land will rapidly increase in value. While not in possession of a "crystal ball" as to precise future projections, Horizon was in possession of much unfavorable material information concerning the possibility of appreciation of its properties which could have been conveyed to purchasers.

Horizon's President, Sidney Nelson, stated in his "Principles of Land Ownership," that the value of land in the future can only be estimated, based upon many complex factors, examples of which include general, regional and local economies, the area rate of growth, interest rates and the availability of capital (RX 1551; see also Finding 57). Horizon's representations and implications were all grossly over-optimistic, without disclosing the many complex factors which affect the future value of its land and which make it highly unlikely that any of its undeveloped land will be an excellent or even a desirable investment. A Horizon official, who conducted numerous surveys of Horizon's sales offices, wrote in respect to the Denver office:

> The future development of Horizon's properties is not presented to the customer in speculative terms stressing its dependence upon many complex and variable factors. But rather, it is dealt with as a predictable assured trend whose pattern and design is known by the representative (CX 929E–F).

Purchasers of Horizon's property were told that Horizon would resell the property for the purchaser, or buy it back, or the sales representative personally promised to resell the land for the purchaser, or that Horizon would assist the purchaser in the resale

of the land,or that there would be no difficulty in reselling the land, or the matter of resale of the property and Horizon's role in resale were intentionally left vague (Finding 61–62). **[265]**

These representations were all false, deceptive and misleading. During the entire period covered by this record - 1968 until 1978, there was no resale market for Horizon lots. The record is clear on this issue beyond any dispute (Findings 123–128). Horizon's officials were aware that the resale market for its lots was nonexistent and likely to remain in this posture for many years; yet, there is no evidence whatsoever of this information being made available to prospective customers or to existing customers, or communicated to them in any manner. In fact, just the opposite representations and implications were made and created.

Horizon's officials, aware that the critical elements of any investment purchase of its undeveloped land concerned the risks involved, the term the property would have to be held before it could be liquidated, the appreciation rate which could be expected during the holding period, and the ease of resale of the property, made no absorption or feasibility studies of any of Horizon's properties, left sales presentations intentionally silent or vague on these critical elements, and knowingly permitted sales representatives to make gross misrepresentations and create implications and innuendos that Horizon's properties would appreciate at a substantial rate and be easily marketable in a short period of time. No efforts were made to disclose to purchasers the highly speculative nature of the properties, the substantial risks involved, and the uncertainty of when, if ever, a demand market for the property would exist. All of these acts and practices were false, misleading, deceptive and unfair.

Horizon's price increases on its property were used to represent directly or by implication that Horizon's land was increasing in value. The record is clear that Horizon's selling prices for its land bear no relationship whatsoever to the market value of the land (Findings 123–132).

Horizon's sales representatives were trained to use the FHA statistics to represent that Horizon land would appreciate at a 20 percent compounded annual rate, and they used these government figures in almost all sales presentations. The use of such a broad representation, without qualification, in respect to a specific property is false and misleading. All property does not go up in value uniformly (Tr. 6778, 15128). Sidney Nelson, Horizon's President, in his "Principles of Land Ownership," recognized the falsity of such a broad, general representation:

The notion that all land increases in value at some particular rate or another is fallacious (RX 1551; see also Finding 57).

Horizon also trained its sales representatives to cite examples of other land, locally and nationally, that had experienced tremendous price appreciation in the past (Finding 50). These representations were deceptive and misleading since they create false expectations and the appreciation cited bears no relationship whatsoever to Horizon's land, or to the price appreciation which could be expected for Horizon's land.

The use of atypical claims of profit made on land, even if true, can be misleading and deceptive. Common sense dictates that many of the claims of profit made on land sales used by Horizon sales representatives **[266]**in their presentations were untrue, or made without knowledge of the truth or falsity of the claim. In any event, no disclosure was made that the profits were atypical, in which event they would be deceptive. *National Dynamics Corp.,* 82 F.T.C. 488, 564–65 (1973), *remanded in part,* 492 F.2d 1333, 1335 (2d Cir. 1974), *modified,* 85 F.T.C. 391, 393–94 (1975), *reconsideration,* 85 F.T.C. 1052, 1053–54 (1975), *cert. denied,* 419 U.S. 993 (1974).

A gross misrepresentation used extensively in the sale of Horizon City and Rio Communities properties concerned the locked-in growth of El Paso and Albuquerque. These representations were intended to convey the implication that these cities could grow only in the direction of Horizon's properties, or that "almost all," or that "most" of the growth of these cities was toward Horizon's properties, and thus these properties were certain to develop quickly and profitably for the lot owners. These representations were false and deceptive. El Paso and Albuquerque had been, and were expected to continue to grow in several directions (Findings 73–76).

Representations that Phoenix was growing to the Northwest toward Whispering Ranch and that only 15 percent of the land in Arizona was available for private development, were intended to create the implication that there was a scarcity of land and that Whispering Ranch property was therefore valuable and would be developed in the near future. These representations were false and deceptive. The growth of Phoenix has had, and is expected to have little impact on Whispering Ranch property, and there has been and is an oversupply of private land in Arizona suitable for development purposes (Findings 88, 108).

Horizon sales representatives represented that the higher-priced multi-family and commercial lots were better investments than other lots when there was no basis for such representations. There is no assurance the lots will ever be developed as multi-family or

commercial property, or that they will be developed in any fashion. Representations were made about corner lots, about cul-de-sacs, about military highways and highway loops, shopping centers, university sites, and satellite core areas, when there was no assurance of when, if ever, such representations would materialize. Thus, these representations were deceptive and misleading.

Horizon's representations that it was a community developer, made in the context of other representations that Horizon was building beautiful communities, golf courses, recreational facilities, shopping centers, and installing utilities in the "building areas" (see Findings 79–80), had the tendency and capacity to mislead purchasers into believing that Horizon was developing or would develop the property being sold and that the property would develop rapidly. These representations were supported by sales presentations utilizing unit maps which showed a plat of what was purported to be a development plan for the property. Representations were made that the HCIA would install utilities, or had the authority to install utilities, or that Horizon or the "developer" would install utilities, etc. (Findings 81–83). The representations about utilities, and the HCIA's and Horizon's future responsibility for development of the land, were vague, and in the context in which made, had the tendency and the capacity to mislead purchasers into believing that the land they purchased would be developed in the near future, and that the price of the lot was all-inclusive. **[267]**

The tax-free status of the HCIA's strictly limit the activities in which the HCIA's may engage (Findings 81–83). Thus, the HCIA's cannot engage in all the activities set forth in the federal property report, such as installation of utilities. Expert testimony confirms the conclusion that the HCIA's accumulation of funds can never meet the financial requirements of an infrastructure sufficient to provide utilities for the Horizon properties (Findings 81–83). These limitations on the HCIA's ability to engage in authorized activities were never communicated to Horizon's customers. Failure to disclose truthful information about the HCIA's was deceptive and misleading.

The property visit credit, the exchange privilege, and the Horizon guarantee were used in a deceptive and misleading manner. The five percent property visit credit was given only if the purchaser acknowledged that the property had not been misrepresented in any way at the time of the initial sale, a requirement not explained previously to customers. The purchaser was unable to evaluate the investment quality of the property at the time of a property visit and thus unable to determine if the property had been misrepresented.

On-site sales representatives continued to misrepresent the land, and they took advantage of the occasion to sell additional property, or to "trade" the customer into more expensive property, or to "trade" the customer closer to the development area if dissatisfaction with the initial purchase was registered. The Horizon guarantee was presented in a vague manner creating the false implication that it was a money-back guarantee if the purchaser was dissatisfied with the property. The granting of a five percent credit only if the customer will acknowledge that the property has not been misrepresented is unfair.

Horizon's sales representatives were trained to use immediate purchase pressure on prospects by representing that there was going to be a price increase in the near future, or that the property would not be available at a later date. Variations on this theme included representations that the customer had been specially selected, that the property would only be available for a 24-hour period, or that the property could only be offered during a fly-in visit. These representations were false, deceptive and unfair for several reasons. First, they placed unwarranted sales pressure on the prospects. They deprived the prospects of an opportunity prior to making the purchase to review the property reports, to cogitate about the purchase, and to seek legal or other advice about the wisdom of purchasing the property. These representations were additionally false, deceptive, and unfair in that Horizon's lots were basically fungible, and there were and would be an abundant supply of lots available for sale at all times.

There were other misrepresentations and failures to disclose material information. Horizon did not disclose to its customers the size and extent of its properties, or the number of lots in its developments. Horizon did not disclose the size of the core areas in its properties and the fact that these areas would be the areas most likely to be developed in the future. Horizon did not make clear and understandable to customers that Horizon had no obligation, and indeed no plans, to assist customers in the resale or development of their properties, that there were no arrangements or plans for an infrastructure in the undeveloped property, and that development of an infrastructure might prove extremely difficult in the future. Horizon did not make customers aware of the oversupply of lots in or near its projects, such as **[268]**Amrep's Rio Rancho property near Albuquerque consisting of 91,000 acres (Tr. 6941). Horizon did not make customers aware of the slow pace of development in its projects; *e.g.*, only 800 dwelling units in Rio Communities in about

fifteen years, and only about 800 homes in Horizon City in fifteen years.

Horizon did not disclose to its customers the fact that malapi, earth mounds, arroyos, washes and flood plains exist on its properties which could affect development of some lots (Findings 85–86). Nor did Horizon disclose that water might constitute a problem, or be a future risk to the development of the properties (Finding 135). In sum, all representations about Horizon's properties were overly optimistic; no risks or potential risks were disclosed to purchasers (Finding 52).[15]

D. Horizon Did Not Make Disclosure of Material Facts to Customers

Horizon maintains that the weight of the evidence has shown that disclosures were made to customers that there is no certainty as to the future value of the lots purchased from Horizon, that the lots are low in liquidity, that resale should not be expected until the land is held for a long term, that there is no guarantee of appreciation or of resale, that the timing of resale is uncertain, and that there are uncertainties or risks involved in the purchase of land as an investment (RPF, p. 153).

Interspersed throughout Horizon's findings on the disclosures it claims to have made to customers are phrases such as "sales representatives were prohibited from predicting any *specific* future value" (RPF, p. 146); sales representatives pledged never to give any "*guarantee* of increase in value" or "*guarantee* of profit" (RPF, p. 147); that Horizon's contract documents had a statement that there was "no *guarantee* of appreciation" (RPF, p. 148); that customers testified that they were given "no *assurance* of appreciation" (RPF, p. 150); customers were informed orally and through written materials that there is "no *certainty* as to the future value of their lots" (RPF, p. 150); sales representatives orally informed customers that they "would have to hold their property for a *long time* before a resale could be anticipated" and that "long term *generally* meant twenty years or more" (RPF, p. 151–52); and that explicit disclosures were made in contract documents that there was "no *guarantee* or *certainty* of resale at any time" (RPF, p. 152).[16] Even assuming that customers were not given an explicit "guarantee" or "assurance" of

[15] Theodore Stone, a former Horizon zone manager, testified:

. . . I can never recall any instance anyone within the company above my position ever attacking our land, being critical of it, or suggesting that it was not a good investment, or that there were risk factors involved, or that it might go down in value, or that it was speculative, in fact, quite the opposite (Tr. 2072).

[16] Emphasis has been added in each instance.

profit within a "specific" time frame, this does not contradict the findings and **[269]**conclusions reached herein that representations were made to customers and implications were created that land purchased from Horizon would be highly profitable within a short range of years, and resale would be easily accomplished. False, deceptive, misleading and unfair representations and implications of profitability without risk can be made although not framed in terms of an absolute guarantee. The Commission has stated on many occasions that it is not confined to analyzing isolated words and phrases in determining what representations have been made, but instead may look to the total impressions created by words in the context in which they are used. *The Raymond Lee Organization,* Docket 9045, Opinion of The Commission, p. 11 [92 F.T.C. 489] (November 1, 1978).

The evidence relied upon by Horizon to establish that no guarantee of profitability was extended to customers is not as clear as Horizon would have it appear. There is no evidence that customers read the disclosures in the Horizon documents; nor is there any evidence in training manuals or otherwise that sales representatives were trained to or did call these statements in the documents to the attention of customers. As for customer testimony that no guarantee was given to them, this testimony was elicited in the context that there was no *affirmative* guarantee stated by the sales representatives (*see* Tr. 1182–83, 1339, 1371, 1551, 4912, 4956–58, 5007, 5009, 5010, 6116, 6131, 6281, 16191).[17] **[270]**

Horizon relies in substantial measure upon written documents as the means by which material facts were disclosed to customers. According to Horizon "One of the prime vehicles for such disclosure was the 'Principles of Land Ownership'" (RPF, p. 147).[18] Significantly, Horizon did not give customers a copy of the "Principles" until several days after the sales transaction when customers received a copy in their Important Document Package (CX 945A, 951E–F). Horizon's own internal surveys of its sales offices reveal that customers did not read the document when received, nor attach any

[17] Colonel John Yuill testified on cross-examination:

Q. It is true, is it not, that neither Mr. Bussinger or any other Horizon salesman gave you a guarantee of appreciation on the lot. No one gave you a guarantee, did they?

A. No, they did not.

Q. To the contrary, they told you there was no guarantee. Isn't that true?

A. I do not recall him making that statement either. (Tr. 879)

Michael Collum testified on cross-examination about a sales representative's reference to doubling of the investment in five to eight years:

Q. Now, there was no guarantee of that, was there?

A. No. He didn't in so many words say, "I guarantee that would happen." (Tr. 1543)

[18] The "Principles of Land Ownership" are set out verbatim in Finding 57.

importance to it (CX 945A). In a survey of the Chicago office during August 1974, the Horizon survey officials reported:

In not one case did we see evidence of the *Principles of Land Ownership* being used in the sales presentation. Though customers receive the statement in the customer package, . . . few customers have read it upon receipt. Indeed, the policy statement may be avoided purposefully as it contradicts present sales presentations (CX 951E–F).

Horizon points out that the Agreements for Deed have "for many years" included a statement that there is "no guarantee of appreciation" for the property and that the same information has been included in the Receipts of Deposit and the PVCC's. PVCC's were received several days after signing the agreement in the Important Document Package. A close examination of the record reveals that no such statement appeared in any of these documents until after 1972 [sales began in 1959—CX 1538A, 1541]. (See, for example, CX 140 and CXs 147–51.) Horizon also emphasizes in its findings that "more recent contracts" have placed an even greater emphasis on this disclosure,[19] and that the contracts also contain the statement just above the buyers' signatures that there is "no guarantee of appreciation, resale or repurchase," and that "Horizon provides no resale services." In support of this finding, Horizon cites RX 981. What Horizon did *not* disclose in its findings, however, is that this form contract is dated June 1977, over two years *after* the complaint herein issued.

As previously indicated, the use of the disclosure that there is no "guarantee of appreciation" sometime after 1972 in contract documents, is of little significance. There is no record evidence that this disclosure was pointed out to customers in sales presentations, or that customers read and appreciated the disclosure. **[271]**

Horizon relies on the federal property reports as a disclosure vehicle (RPF, pp. 159–60), and notes that as of December 1973 each property report was required by OILSR to have a section entitled Special Risk Factors (RPF, p. 149). Detailed findings on the use of the federal property report have been made (Finding 77). These findings support a conclusion that the federal property report did not make adequate disclosures to Horizon's customers of the speculative nature of the property and the many risks associated with an

[19] The disclosure reads as follows:

The purchase of all land entails risk. The future value of this land and your ability to resell it are uncertain being subject to many market factors. The future population growth of this subdivision and the surrounding areas cannot be predicted.

investment in Horizon land; in fact, the federal property reports were used by sales representatives more as a sales aid than as a disclosure statement.

It is clear that sales representatives did not emphasize the importance of the property report or its function as an informational device for customers (Finding 77). Sales representatives were trained to refer to the property report in a superficial manner, and to avoid having the customer pick up the property report and read it during the sales presentation, by instructing sales representatives to refer briefly to the property report at the beginning of the sales presentation and then to *replace* it in their briefcase. Sales representatives were instructed that the property report was to be *delivered* to the customer *after* a commitment to purchase had been made and at the same time the customer was busily engaged in signing the contract and other papers connected with the sale, and writing a check for the down payment (Finding 77).

The procedures for delivery of the property report, emphasized in the training manuals, instructed the sales representatives to deliver the property report in an inconspicuous manner along with other papers without giving the customer an opportunity to read the report prior to completion of the sale.[20] Further, customers were unable to read and comprehend property reports in the carnival-like atmosphere of the dinner parties (Finding 77).

The record establishes that the significance of the federal property reports was not communicated to customers, that actual delivery of the reports was designed to gloss over its importance as a disclosure instrument, and that customers did not read the reports. Thus, the federal property reports did not make material disclosures to customers about Horizon's property.

TBA maps were used in sales presentations, and Horizon contends that significant disclosures about the property were made on the reverse side of these maps (RPF, pp. 163–65). The TBA maps were used in sales presentations primarily to depict the locked-in growth patterns of the metropolitan areas (*see* CX 205 and 221, for example), and there is no record evidence to support a conclusion that sales representatives were instructed to read the reverse side of the TBA maps to customers, or that customers read the reverse side of the maps (see Tr. 1142). **[272]**

Finally, Horizon argues that disclosures were made orally by sales representatives. This argument is rejected. The record evidence

[20] Sales representatives testified that if the customer was reading the property report he would not be listening to the sales presentation (Tr. 4627–28). One sales representative testified:

> But you don't go and say, here is a two-hour property report because then people fall asleep and you have no chance to sell anymore. We were out to make money. (Tr. 16108)

supports a conclusion that sales representatives were not trained to make affirmative disclosures to customers. On the contrary, sales presentations were designed to present an overly optomistic image of Horizon land without disclosing any information that might be detrimental to a sale. Many of the disclosures that had to be made, *i.e.,* federal property reports, were made in an inconspicuous fashion; other material facts were disclosed in a vague, self-serving manner; and finally, sales presentations were planned so the prospect could make his own optimistic projections or answer his own questions based on the sales presentation without involving the sales representative, who might have to make an outright misrepresentation or lose a sale.

Although not stressed by Horizon as a disclosure method, property visits did not provide customers with material disclosures about Horizon's property. Property visits always occurred sometime after the initial sale to a customer. Property visits were utilized by Horizon as an opportunity to sell more property to customers. The record also establishes that there were further misrepresentations and deceptions at the time of the property visits. It is also clear that customers cannot make an evaluation of their purchases by a visual inspection of the property (Finding 67).

Thus, a conclusion that Horizon had a policy or practice of disclosure of material information or that Horizon did make disclosure of all material information to customers, is not warranted on this record.

E. Credibility of Horizon's Witnesses

Horizon in its findings relies extensively on the testimony of "satisfied" customers and its officials as support for its policy of disclosure to customers (see RPF, pp. 165–66, for example). Horizon elicited testimony from customer witnesses who testified they were satisfied with their Horizon property, and that the property had not been misrepresented to them at the time of purchase (*see, for example,* Tr. 8065–85, 8086–8134, 8724–54, 8912–40, 8941–72; but see Tr. 8964–65, 8971–72). Assuming that these customers were satisfied and that the property was not misrepresented to them,[21] does not

[21] E.E. Golden, a customer witness called by Horizon, testified that he was told, *inter alia,* that Rio Communities property was a long-term investment—ten years or longer (Tr. 8944, 8965); he was traded out of single family property into an acreage parcel in Tierra Grande because the sales representative was "all excited" about Tierra Grande and it was represented that Mr. Golden would "benefit more" from the Tierra Grande acreage property (Tr. 8951, 8964); the Tierra Grande lot was later exchanged into Waterwood [trades always increased the customer's total indebtedness] (Tr. 8956–57); that Albuquerque has only one way to grow (Tr. 8965, 8971–72); that you can trade for a closer lot which would appreciate faster (Tr. 8966); and that Waterwood property was appreciating in value (Tr. 8970–71). Although Mr. Golden may have been a "satisfied" customer, this should not be construed as implying that the property was not misrepresented to him.

refute the testimony of other [273]customers and the substantial evidence of record which establishes that misrepresentations were made and that material information was withheld from customers as a matter of routine operation:

> That a person or corporation, through its agents, may have made correct statements in one instance has no bearing on the fact that they made representations in other instances. The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them. *Basic Books* v. *F.T.C.*, 276 F.2d 718, 720–21 (7th Cir. 1960). See also *Independent Directory Corp.* v. *F.T.C.*, 188 F.2d 468, 471 (2d Cir. 1951).

Horizon also called as witnesses sales managers and sales representatives who testified that customers were well-informed about Horizon's property and policies, and that the property was not misrepresented. Where this testimony conflicts with the substantial record evidence which demonstrates a continuing practice of misrepresentation, of creating deliberate false implications, and the withholding of material information, it is entitled to and is being given little credence. The testimony of Tony Frederico, zone manager in Horizon's Chicago office, and the testimony of Lee Rempas, office manager in the Chicago office, demonstrate why the testimony of Horizon's sales employees warrants little credence.

Both Mr. Frederico and Mr. Rempas were in the Chicago office during the entire relevant time period of this proceeding (Tr. 11741, 11954). One hundred percent of the zone activity took place in the Chicago office (Tr. 11743); the Chicago office ran a large dinner party operation, as well as in-home sales (Tr. 11744, 11795, 11982). Mr. Frederico testified that if the "Principles of Land Ownership" were not used in the sales presentation, the sales contract was not processed (Tr. 11750, 11813). Mr. Rempas testified that sales representatives always used the "Principles" (Tr. 11957, 11963, 12002, 12005–06). In stark contrast to this testimony, a survey of the Chicago office during August 1974 by Bruce Lehmann and Webb Parker of Horizon's Customer Service Department reported that "in not one case did we see evidence of the Principles being used in sales presentations . . . Indeed, the policy statement may be avoided purposefully as it contradicts present sales presentations" (CX 951E–F).

Mr. Frederico testified that the Chicago office always used long-term investment potential in sales presentations of Horizon's property. His office conducted sales meetings every Monday and Thursday to keep sales representatives informed of the policy of the

company, and to make certain sales representatives "sell right" and tell people the truth (Tr. 11772). The Thursday meeting was an open meeting where sales representatives discussed the right way to sell. Mr. Frederico attended these meetings to make certain everything was in accordance with company policy (Tr. 11777). Mr. Frederico testified that at the meetings he **[274]**would tell the sales representatives that the Horizon land would be good only for customers' children or grandchildren. Throughout his testimony Mr. Frederico continually emphasized that the Chicago office was selling a long-term product (Tr. 11760, 11763, 11765); that the land should only be purchased for "their kids or grandchildren" (Tr. 11770); "A long time always. We always told them it takes a long, long, long time" (Tr. 11770); sales representatives were trained to use a long, long term (Tr. 11771). Other statements in his testimony included "there would be a long, long time for [lots] to reach the development stage, and I mean a long, long time" (Tr. 11775–76), "30 to 40 years" (Tr. 11776), "a long, long term" (Tr. 11781), "I told them they had to wait a long, long, long time" (Tr. 11798), "I mean between 15, 20 or 30 years" (Tr. 11798), "long-term potential appreciation" (Tr. 11806):

Q. What, again, is long-term, sir?

A. Long-term, again, is 15 or 20 to 30 years. (Tr. 11807)

Mr. Rempas, who served as office manager, trained sales representatives, accompanied them on many sales presentations, and attended hundreds of dinner parties (Tr. 11955–56, 11968, 11980–82; *see also* Tr. 11747, 11751), testified that sales representatives were told that development was a long-term matter and not to guarantee anything (Tr. 11962, 11965). He also testified that sales representatives were instructed not to state a time period within which customers could resell for a profit (Tr. 11963). "It could be 20, it could be 30, it could be 100. I do not have a crystal ball to tell you exactly" (Tr. 11966, 12011–15). Mr. Rempas testified that a time frame to profitability was never used at dinner party presentations (Tr. 11969). He reiterated several times the long-term nature of the product which was utilized by sales representatives in sales presentations, 20 to 30 years (Tr. 12013–14), long-term of 20 years or more (Tr. 12013, 12015). He referred to Whispering Ranch as a "long-term, I mean a long, long, long-term" (Tr. 11994). He testified that time periods of less than 10 years never came up at sales meetings (Tr. 11976). He further testified that he had heard only once a specific time period mentioned in a sales presentation, and he reprimanded that sales representative (Tr. 11971). He also testified that he never

heard a sales presentation that used a specific rate of appreciation (Tr. 12010–11).

This testimony by Mr. Frederico and Mr. Rempas, the Chicago zone manager and the Chicago office manager respectively, was flatly contradicted by Horizon's internal survey of the Chicago office, which was conducted during July and August 1974 (CX 951A–J). This report has the following summary statements:

The Chicago office is not selling a long-term asset. What is being sold is a short term investment opportunity ranging from 4 to 12 years to maturity depending on property type and location (CX 951E).

* * * * * * *

[275]The Chicago office suffers from one problem. The sales representatives (especially those with longevity) are reluctant to accept the long-term nature of our product (CX 951J).

Sales representatives from the Chicago office testified in this proceeding, and confirmed the widespread and routine use of rates of appreciation to be expected by purchasers of Horizon land, and the time period necessary to realize the appreciation. Anthony Zimmer, employed in the Chicago office from December 1970 to April 1972 (Tr. 6137–38), testified that he received no formal training, but he observed Jerry Steers, a leading sales representative in the Chicago office, make sales presentations as part of his training (Tr. 6139). Mr. Steers used a four to seven year time frame for appreciation, and the value of a $900 to $1400 lot would be $4500 to $7000 in four to seven years (Tr. 6144). All the sales representatives used the $4500 to $7000 figure (Tr. 6151), and Mr. Zimmer used the four to seven year holding period and appreciation to $4000 to $7000 in four to seven years (Tr. 6153).

Alvin Schuman, employed in the Chicago office from 1968 until 1975 (Tr. 5960), testified that he represented to purchasers that real estate was appreciating at a 25 percent per annum rate (Tr. 5965, 5997). Mr. Schuman also represented that a $2700 purchase would be worth between $9–12,000 in five to seven years (Tr. 5970, 6003–04, 6010–11, 6023, 6026–27). The five to seven year period was used all the time at dinner parties (Tr. 6008–09). Mr. Zimmer testified that he represented that the rate of development was "one square mile per year . . . anytime I needed it" (Tr. 5972). He further testified that the only representation he was ever stopped from using during the entire time he was employed by Horizon was the word "investment". The word appreciation was substituted for investment (Tr. 5983, 6007).

Both Mr. Frederico and Mr. Rempas stressed the practice in the

Chicago office of team selling, that is, the sales representatives generally operated in pairs (Tr. 11751, 11778, 11809, 11965), which practice was confirmed by the internal survey of the Chicago office (CX 951E). Since sales representatives were aware of what each other were doing and discussed sales activities on a twice-weekly basis, and dinner parties were attended by Mr. Rempas on a regular basis (Tr. 11968), it taxes credulity to believe that these two supervisors, who stressed the training and close supervision given to sales representatives in the Chicago office, and whose livelihood depended upon sales made by these sales representatives, were unaware of the misrepresentations being made. It is also significant that the misrepresentations were not made by new or short-term sales representatives, but by sales representatives with longevity (CX 951J; Tr. 6137–38, 5960).

The widespread use of misrepresentations by sales representatives, substantiated by the record and in particular by Horizon's own internal surveys of its sales offices, is a sufficient basis to give little or no credence to self-serving denials and explanations offered by Horizon's officials in their testimony. **[276]**

F. Horizon's Land Is Not An Excellent Investment And It Has Little Or No Value As An Investment

There are three fundamental factors to be considered in a real estate investment; the property itself, the financial return or investment structure, and the people who are involved as investors, managers and active partners. All three factors must work together; an investment lacking in any one dimension should be rejected. An investment can be rejected based on any one of a number of factors, such as the available supply and demand, the known physical condition of the property or uncertainty as to the physical condition, uncertainty as to title, zoning, water or mineral rights, and uncertainty as to whether an organization exists which has the capability to carry out the investment (Finding 101).

Undeveloped land lacks liquidity and produces no income. Its investment value is related to the end use to which the land can be placed. To have value land must have some utility or some logical use within a reasonable period of time (Tr. 6587, 7581, 7589–90; CX 778H; RX 1551). Undeveloped land's future value can only be estimated by judging when in the future a user market will exist, and what the value of the property will be at that time. Undeveloped land's estimated future value should then be discounted dependent upon the time differential involved to determine its present estimat-

ed value (Tr. 7590, 15310–11; RX 1551). Professor Howard Stevenson, complaint counsel's expert, stated that undeveloped land should be purchased only when a change in use is imminent and when the conditions surrounding that change can be examined and verified (Tr. 6592, 6883). Alan Nevin, Horizon's expert, concurred in that view, and he further stated that the time period involved in investments in vacant land was usually five to seven years (Tr. 16066, 15883–85).

The investment quality of Horizon's land depends upon (1) the rate at which the lots are absorbed—placed into an end use, (2) the price originally paid, (3) the future costs of any development expenses to be incurred, (4) the carrying costs of the property until absorbed or liquidated, and (5) any risk factors involved (Tr. 6880–81). Some of the carrying costs on Horizon land include real estate taxes, HCIA charges, interest paid on the purchase price, interest lost on the money invested in the property, and the commission paid on resale, which on undeveloped land is usually 10 percent of the sale price.

Alan Nevin stated that an investment to be characterized as excellent, and he knew of very few such investments, should have a high guaranteed tax shelter, cash flow, substantial equity built up, guaranteed high level of appreciation - probably 15 to 20 percent or more, and be risk free (Tr. 15955). He further testified that where there is **[277]**uncertainty as to the time of resale of undeveloped lots, or uncertainty as to the resale price, the property cannot be considered an excellent investment.[22]

There is literally a glut of lots in and surrounding each of Horizon's properties. Some of Horizon's properties are so large that it is difficult to comprehend the enormity of the area. Rio Communities, for example, has a total of approximately 249,000 acres divided into 172,020 lots. By contrast, the District of Columbia has 39,680 acres.[23] Rio Communities is over six times as large as the District of Columbia. Horizon City has approximately 87,000 acres divided into 139,507 lots. It is over twice the size of the District of Columbia. Arizona Sunsites is also larger than the District of Columbia, and Waterwood is two-thirds as large as the District of Columbia.

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[22] Mr. Nevin's testimony, specifically about Horizon's lots, was as follows:

Q. In analyzing a purchase from the point of view of the purchaser, in your opinion, can an investment of Horizon lots, where there is uncertainty as to the time of resale, be considered an excellent investment with little or no financial risk?

A. Absolutely not.

Q. In analyzing a purchase from the point of view of the purchaser, can an investment of Horizon lots, where there is uncertainty with respect to the amount of the resale price, be considered an excellent investment with little or no financial risk?

A. No. (Tr. 15956)

[23] The District of Columbia has 62 square miles within its borders; a square mile has 640 acres (640 × 62 = 39,680). Webster's New International Dictionary, 2nd Ed., pp. 1523, 3052.

The overriding defect in all of Horizon's properties is their tremendous size in relation to the markets in which they are situated. The absorption of these properties is projected so far into the future that it is impossible to foresee the ultimate risks that may exist. Further, there is no organization in existence capable of carrying out the development of such large scale projects. These properties can be rejected as investments for these reasons alone, and an elaborate investment analysis is not necessary to reach this conclusion. A well-informed investor should not buy an undeveloped lot in the sticks where he is competing with thousands of other lots and where there is uncertainty as to the time of resale of the property and uncertainty with respect to the resale price.

In the Albuquerque area, there is an abundance of land available for development purposes. The 1985 land use plan, prepared by the Albuquerque Planning Department in 1964, concluded that there was sufficient developable vacant land within the Albuquerque area to accommodate 2 **[278]**million people. The population of Albuquerque as of 1985 was projected to be 685,000.[24] In addition, the report noted that Indian reservations to the north and south of Albuquerque and the Mesa to the west are potentially available for urban-type development (CX 828Z–3). There are numerous subdivisions surrounding Albuquerque that are developing and can be developed, an unlimited supply of land. For instance, just north of Horizon's Paradise Hills project is Amrep's Rio Rancho project of approximately 100,000 lots with only about 2,000 homes at present (Tr. 3153). Professor Stevenson testified that the availability of land in the Albuquerque area exceeds the full needs of the community under even the most optimistic population projections through the end of this century and perhaps well into the 22nd century (Tr. 6676).

Horizon owned at one time in excess of 4,500 lots in Paradise Hills. As of June 1978, there were approximately 1,100 dwelling units in Paradise Hills, with about 100 units under construction, an average of less than 100 units constructed each year since the beginning of Paradise Hills in the early 1960's (Findings 8–10, 118). Horizon now has approximately 3,500 lots in Paradise Hills which are available for development. Individual lot owners must compete with Horizon in any attempt to sell their lots. Further, the bulk property owners will likely have to await absorption of the platted lots before their

[24] The Middle Rio Grande Council of Governments published a report in 1972 which projected a population of 580,000 for Albuquerque in 1985, and a population of 762,000 by 1995 (CX 836, pp. 9, 11–12). Dr. Benjamin Stevens, Horizon's expert, has projected an Albuquerque population of 605,000 as of the year 2005 (RX 1557D), and Mr. Nevin, another Horizon expert, has projected a population of 1,250,000 by 2005 (Tr. 15909). Population projections for Albuquerque have been declining since the early 1960's, demonstrating the unreliability of area population projections far into the future.

bulk lots will be marketable. Most of the Paradise Hills property was sold prior to 1970. Thus individual lots owners will have to wait many decades to liquidate their property.

In Rio Communities, Horizon owns 5,400 acres in the core area where approximately 800 houses have been built over the past several years. The 5,400 acres are subdivided into 5,600 single family lots, 50 acres multi-family, 300 acres commercial and 600 acres industrial. Additionally, Horizon owns 11,100 acres in three other core areas and six town centers throughout Rio Communities where no development has taken place (Findings 11–13, 119). At the present rate of building, it will take decades to absorb Horizon's core areas. Individual lot owners will have little opportunity to liquidate their investments until Horizon's existing inventory of lots has been exhausted. This could be well into the next century, if then.

Rio Communities is 35 miles south of Albuquerque and is viewed as a "satellite" of Albuquerque by Horizon's expert, Dr. Stevens (Tr. 14807). Dr. Stevens, in projecting the population growth of Rio Communities, relied to a substantial extent on an influx of retirees to accelerate growth. Dr. Stevens admitted that projecting retirement migration was much more difficult than predicting economic growth (Tr. 14825).

Rio Communities growth has been at a rate of less than 100 houses per year in the past. Its future growth rate is uncertain. If the past **[279]**growth rate over several years is duplicated each year in the future, it will take 130 years to fully utilize all the lots in Rio Communities. It is concluded, therefore, that an individual lot owner has little prospect for liquidating his investment in a Rio Communities lot until well into the next century.

El Paso has a history of orderly growth through annexation of surrounding lands, and growth and development is concentrated within the annexed area where city water, sewer, and other services are made available (Tr. 2595–96, 15213–218, 7023–24, 6988–89). The City of El Paso in the past has been growing in a three-directional dimension - to the northwest, the northeast and the southeast. Studies by the El Paso Planning Department project that growth will continue in this same manner in the future. The population of the El Paso SMSA is projected by the Planning Department to be 742,450 by the year 2005 (CX 876), a projection accepted by Joseph Lusteck, complaint counsel's expert in this proceeding, and by D.A. Lomax, Horizon's expert (CX 876; Tr. 6988, 15216).[25]

[25] Dr. Benjamin Stevens, Horizon's expert witness on regional planning, projected a population for the El Paso SMSA for the year 2005 of 863,700 as a high, 809,800 as a medium, and 745,000 as a low (Tr. 14717; RX 1557B). Thus, Dr. Steven's low projection comports with the El Paso Planning Department's projection. Mr. Nevin projected a population of 850,000 by the year 2005 (Tr. 15912–13).

There is sufficient vacant land within the El Paso city limits and the 5-mile extra-territorial jurisdiction of the city to satisfy the urban needs of the City of El Paso through the year 2005 (Tr. 7020–27, 7043). The Horizon City project falls largely outside of this area where urban growth can reasonably be expected to occur (Tr. 7043). Mr. Lusteck projected that only 2,859 acres, or 3.3 percent of the total acreage in Horizon City, will be absorbed by 2005. Mr. Lusteck testified that the Horizon City project is so large that there is a very slim chance for 97 percent of the Horizon City lots to be absorbed by the year 2005 (Tr. 7043, 7078–79).

Horizon's experts, Dr. Stevens and Mr. Lomax, projected the land absorption in Horizon City to be 19,000 acres by the year 2005 (Tr. 14713, 14779, 15224). Mr. Nevin, another Horizon expert, projected land absorption in Horizon City of 20–22,000 acres by 2005 (15912–13). Thus, Horizon's experts project absorption of less than 25 percent of the land in the Horizon City project by the year 2005.

At present, Horizon owns 10,400 acres of land in two core areas of Horizon City (Finding 120). There is 6,400 acres in the core area nearest the El Paso city limits, which has 10,000 single family lots. There are approximately 800 homes in this core area which have been built in a period of over ten years. It is concluded that most of the development in Horizon City that will occur by the year 2005 will be in the 6,400 acre core area nearest to El Paso, with some development in the core area near the lake, if Horizon finds it expedient to develop the second core area. Horizon has the financial ability to develop lots in its core areas over the next three decades; individual lot owners are incapable of developing an infrastructure to provide services to the individual lots. There may be some few lots owned by individuals and located within the extra-territorial jurisdiction of El Paso adjacent to the core area that will **[280]**be developed by the year 2005, and there may be some lots along Horizon Boulevard that will be developed,[26] but the percentage of these lots where development is possible to the total lots in the project will be very insubstantial.

Because of the historical growth pattern of El Paso, the individual lot owners in Horizon City will have to await the arrival of city services for an opportunity to develop their lots, or to sell their lots to a demand market. The fractionalization of ownership of the individual lots in the Horizon City project makes it highly unlikely that a developer will attempt to assemble and develop Horizon City lots absent arrival of the city services, especially when there is

[26] The record does not make clear who owns the lots along and adjacent to Horizon Boulevard. It is entirely possible that Horizon has retained ownership of all or a substantial portion of these lots.

available other developable land with potential city services and under a common ownership where no title clearance problems will exist. Thus, it is concluded that the Horizon City project is "grossly excessive", relative to the size and potential for growth of El Paso (Tr. 7041), and that there is little chance for the individually-owned lots to be placed in urban use by the year 2005 (see testimony of Joseph Lusteck, Tr. 7041, 7043, 7078–79).

Arizona Sunsites and Whispering Ranch are located in areas where there is an oversupply of vacant land in subdivisions available for development purposes through the year 2000 (Finding 108).

Whispering Ranch is located in a remote area far removed from economic activity of any kind. Whispering Ranch is suitable only for the cattle grazing purposes for which it was used prior to Horizon's acquisition of the property. The location has no labor force, no roads, no utilities, and it is extremely unlikely that it will have any utility for residential, commercial or industrial purposes within the next thirty years (Tr. 3396). Fractionalization of the land makes it unlikely it will be used for a purpose such as cattle grazing, or by a large industrial user desiring a large tract of land.

Arizona Sunsites is located in an area where there is an oversupply of subdivided vacant land, and land that readily could be placed in subdivisions if a demand warranted (Tr. 4816–17). Arizona Sunsites is primarily a retirement community. It has no labor supply and consequently no potential for industrial development. It also is unlikely to develop as a retail trade center because of the sparse population. The growth of nearby towns and cities has had, and is likely to have little impact on the growth of Arizona Sunsites. It is dependent upon retirees for future growth, but its limited medical facilities is not conducive to substantial growth as a retirement center (Tr. 3400–14). Frank Mangin, Program Director for Economic Development for the Arizona Governor's Office, noted that Arizona Sunsites started in 1961 and in 1977 had a population of 850 persons, an annual growth rate of approximately 60 persons per year. He projected that this limited growth rate would continue in the future (Tr. 3400–16). **[281]**

Waterwood is a 25,000 acre recreational project (Tr. 15957, 14879–83) located at Lake Livingston, 100 miles north of Houston. As of 1978, there were approximately 120 houses in Waterwood and 40 to 50 houses under construction (Finding 21, p. 16). Approximately 7–8000 acres have been subdivided. About 1,000 acres have been fully improved, which includes the golf course and other facilities. Horizon owns 2,823 single family lots, 230 multi-family lots and 12 commercial lots in Whispering Pines units, none of which have been

sold. Deer Creek Village has 4,976 single family lots and 159 multi-family lots, of which 1,589 had been sold as of May 4, 1978. As of that date, Green Tree Village had 2,356 single family lots and 133 multi-family lots, 993 of which had been sold (Finding 121).

Dr. Stevens, based on highly speculative reasoning, projected 5,000 dwelling units to be built in Waterwood by the year 2005 (Tr. 14879–83, 15029–31, 15045). A continuous marketing program is necessary to promote Waterwood as a recreational area (Tr. 15957–58). Horizon, which owns well over 3,000 lots in the Whispering Pines and Country Club Estates Units, none of which have been sold to the public, is in a much stronger position to market these lots to the public than an individual lot owner. Additionally, Horizon owns some 18,000 acres in Waterwood and can subdivide any number of additional lots, as the market may demand. Further, Horizon has sold less than half the lots in Deer Creek Village and Green Tree Village.

Horizon's expert, Charles Osenbaugh, testified that Horizon will "get the first crack" at any interested buyer, and Horizon's prices will set the upper limit of any resale market (Tr. 15794–95; *see* also Tr. 8153). Professor Stevenson placed the potential absorption of the Waterwood lots many decades in the future. Professor Stevenson reasoned that because of the distance of the project from Houston, the availability of a substantial number of competing recreational projects much nearer to Houston, some with the infrastructure in place and the total number of lots in the project known, and because of the potential competition Horizon could bring into the site from the 18,000 acres of unplatted land; there was little opportunity for up side potential on the Waterwood lots (Tr. 6761–63).

At the present time, there is no resale market for any of Horizon's lots outside of the core areas. Extensive findings demonstrating the lack of a resale market have been made (Findings 123–128). Evidence supporting a lack of a resale market and an absence of present market value includes: (1) inability of real estate brokers to resell the land and even a refusal to accept listings on Horizon's lots; (2) unsuccessful attempts by individuals to sell their lots; (3) the substantial number of forfeitures by purchasers; (4) the substantial number of Horizon lots auctioned at tax sales; (5) the failure of the land auction sales to attract bids on the Horizon lots; (6) testimony of the expert witnesses who were unable to find a resale market for Horizon lots; and (7) the assigning of a minimum appraisal value to the lots for tax purposes. In a few isolated instances where lots have been sold by individuals, it appears that the lots were sold for less than the price at which Horizon originally sold the lots.

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The ultimate in a lack of value is a lot nobody wants. The fact that there is no resale market for Horizon's lots, even after some of the property has been held for up to fifteen years, is a strong indictment of Horizon's sales program, which has lured thousands of people to purchase [282]sight unseen as an excellent investment, what is virtually worthless desert land. Horizon, while selling its lots at an inflated price, knew of the lack of a resale market, but did not disclose this material fact to purchasers. Horizon's knowledge can be imputed, *inter alia,* from the substantial number of forfeitures, from the inquiries which it received from customers wanting to sell their lots, from the extensive tax sales and the auction sales, and from the actions of the real estate boards in Albuquerque and El Paso in refusing to list Horizon lots for sale.

Horizon called several expert witnesses to testify that its prices for its lots at the time of the sale to purchasers represented market value. These experts also projected the future value of the lots to establish that the lots were, in fact, reasonable investments.

Horizon's expert witnesses, D.A. Lomax, Sanders Solot, Charles Osenbaugh and Alan Nevin, as part of their evaluation of the Horizon lots as an investment, determined that the purchasers of Horizon's lots were knowledgeable buyers, and that the prices at which the lots were sold by Horizon represented market value at the time of the sale.[27] This determination, which is contrary to the conclusions reached herein, was based on superficial surveys of purchasers of Horizon's lots (Tr. 15112–14, 15630–31, 15916–20; RX 1574, 1568), which appear to have been conducted with a foreordained result as the objective. These expert witnesses concluded that Horizon's selling prices for its lots, *e.g.,* $1,000 per lot, represented market value at the time of the sale, even though these witnesses recognized that there was no present market of any kind for the lots (Tr. 15289, 15687–90, 15761). The superficiality of the surveys, and the conclusions drawn from the surveys as to knowledgeability of the purchasers of Horizon's lots, casts a cloud over the credibility of these witnesses in all respects.

The determination by the witnesses that Horizon's selling prices represented market value is crucial to the testimony of these witnesses as to the future value of Horizon's lots. Horizon's witnesses concluded that Horizon's selling prices represented market value. They then projected these "market prices" into the future based on a compound annual rate of appreciation, approximating what the witnesses anticipated the inflation rate will be in the future.

[27] One of the conditions implicit in a determination of whether the selling price of property reflects "market value", is a knowledgeable buyer—a well-informed or well-advised buyer (Tr. 7578, 15092, 15762, 15782).

Assuming land will generally appreciate in value in the future at a compound rate related to the rate of inflation, to arrive at an estimated future value you must start with a realistic present market value.

Horizon's experts used Horizon's inflated selling prices as the market value. This incorrect base figure skewed the future projections of value. For example, Horizon paid an average of approximately $55 per acre for the Rio Communities property and sold the land at a price of approximately $5,000 per acre (Finding 137). **[283]**

$55 at an 8% compounded rate for 30 years = $553.45

$5,000 at an 8% compounded rate for 30 years = $50,313.28

Horizon paid approximately $135 per acre for the Horizon City land and sold the land for approximately $6,000 per acre (Finding 137):

$135 at an 8% compounded rate for 30 years = $1,358.46

$6,000 at an 8% compounded rate for 30 years = $60,375.94

Horizon paid approximately $150 per acre for Whispering Ranch property and sold the land for approximately $700 per acre (Finding 137):

$150 at an 8% compounded rate for 30 years = $1,509.40

$700 at an 8% compounded rate for 30 years = $7,043.86

There are other significant reasons for attaching little credibility to the future value projections offered by Horizon's expert witnesses. D.A. Lomax, when interviewed by complaint counsel as a prospective witness at a time prior to his engagement by Horizon as an expert witness, took positions directly contrary to his testimony in this proceeding (Finding 114). His answers to complaint counsel's questions comport more with the evidence in this record than his testimony for Horizon at trial. Mr. Lomax admitted stating to complaint counsel during the interview that a well-informed purchaser would never have bought Horizon's land, that an individual investor does not buy a lot in the sticks where he will be competing with 100,000 other lots. Mr. Lomax also admitted stating to complaint counsel that he would not recommend that anyone under any circumstances buy Rio Communities lots, with the possible exception of lots in Tierra Grande. Mr. Lomax's answers to complaint counsel, when he was an uninterested and unpaid land

appraiser, are far more credible than his testimony in this proceeding.

Sanders Solot accepted Horizon's sales prices as establishing market value, based on a highly superficial survey, when he knew there was no present market for Whispering Ranch property. His selection of comparable properties are suspect, as they were located many miles from Whispering Ranch. His appraisal also differs from testimony of real estate brokers located in the Whispering Ranch area (Tr. 3233–35, 3260–61). His appraisals are entitled to little weight. The Whispering Ranch appraisals of Roy Humble, Arizona's tax assessor, is more credible based on this record.

Charles Osenbaugh's purported determination of the knowledgeability of purchasers of Waterwood lots, based in substantial part on the purchasers' addresses, points up the cursory nature of his investigation of the market value of the Waterwood lots.

Alan Nevin, while recognizing the massive failure of the New Towns, which had federal government assistance, found Horizon's [284]developments to be viable. The superficiality of Mr. Nevin's testimony is highlighted by his conclusion from a buyer profile he compiled from existing Horizon records, that purchasers of Horizon's lots had used "discretionary" funds in purchasing Horizon lands. Examples of information which Mr. Nevin did not have in compiling his buyer profile, was the number of dependents a purchaser had or the amount of his debts. Forty percent of the purchasers in Mr. Nevin's profile had incomes of less than $10,000 per year. It is unlikely these purchasers had "discretionary" income to invest in distant land.

Mr. Nevin did recognize, however, that Horizon has the best of both worlds. Horizon has shifted its financial burden to the lot purchasers. It has sold off for cash the undesirable lots in the outlying areas at inflated prices while retaining the most desirable land in its core areas. The money realized from the sale of the outlying lots is available to Horizon to develop its core areas. Therefore, Horizon does not have the heavy carrying costs that usually cripple new towns (Tr. 16032).

There are numerous risks in purchasing one lot in Horizon's enormous projects. One of the risks beyond mere supply and demand is the fractionalization of ownership of the land. As time passes, title problems become more severe. Builders prefer to utilize several lots at a time. It is uneconomical to develop one lot at a time. The lack of an infrastructure to provide utilities is a significant risk. The financial outlay necessary to provide city services to one of Horizon's developments 30 years in the future is so large as to be almost

incalculable (Tr. 6690, 7048–51). There are many unknowns when looking 30 years or more into the future such as water and sewage problems. The physical condition of the property, *i.e.,* arroyos, flood plains, malapi, and earth mounds pose problems for some lot investors.

The uncertainties as to ultimate absorption, the lack of an infrastructure, the fractionalization of ownership, and the unknown risks associated with long-term development over the next several decades, make Horizon's lots bad investments. Professor Stevenson recommended defaulting and taking a tax loss on Rio Communities lots (Tr. 6752–54). Jack Mann recommended that owners of Horizon City lots discontinue the payment of taxes, thereby defaulting on the property and claiming an investment loss as an income tax deduction (CX 892). These conclusions are supported by the record. Horizon's lots are not only bad investments, they are worthless as investments.

G. Retention Of Money By Horizon

Count XXXII, Paragraphs 81 and 82, alleged that Horizon has induced members of the public through unfair and deceptive acts and practices to pay substantial sums of money towards the purchase of lots located in Rio Communities, Horizon City, and Whispering Ranch when said lots are of little value to purchasers as investments and little use as homesites, and has failed to offer to refund or refused to refund such money to purchasers. The continued retention of the money is alleged to be an unfair act or practice.

It will be observed that the complaint allegations of Count XXXII specifically designate only three of the six properties with which this [285]proceeding has been involved. Complaint counsel contend that Horizon was notified by complaint counsel's trial brief filed November 23, 1976 that complaint counsel intended to offer proof that the continued retention of funds received through the sale of all of Horizon's land is an unfair practice. Complaint counsel therefore contend that respondent was placed on notice that Paragraphs 81 and 82 cover all of Horizon's properties.

Horizon objects to complaint counsel's efforts to enlarge the scope of these paragraphs (RRB, p.267).[28] Horizon's primary basis of objection is the unambiguous language of Paragraph 81 which specifically designates only three properties, and the passage of over three years since issuance of the complaint, during which complaint

[28] See complaint counsel's letter and respondent's letter setting forth their respective positions on Count XXXII, which have been incorporated into this record (see Order Incorporating Letters Into Record, dated September 6, 1979).

counsel never sought to amend the complaint to designate other properties. Horizon further contends that the other paragraphs of complaint counsel's trial brief contradicts the paragraph of the brief relied on by complaint counsel, leaving the general understanding to be derived from the trial brief ambiguous as to complaint counsel's intentions.

The allegations of Count XXXII that the lots in Horizon's Rio Communities, Horizon City and Whispering Ranch "are of little value to purchasers as investments and little use as homesites," introduce no new issues to this proceeding. The entire record consists of evidence establishing the representations which were made as to the investment quality of all of Horizon's lots, and evidence respecting the value of those lots currently and into the future. This evidence concerned all six properties, not just the three properties enumerated in Count XXXII. The additional allegation stated in Count XXXII is Horizon's continued "retention of the sums" paid for lots of little value as investments and little use as homesites. Evidence adduced in this proceeding has shown that Horizon has retained the sums paid in on lots in all six properties. There was no separating out evidence as to just the specifically enumerated properties, nor is there any indication whatsoever that funds from the enumerated properties were handled differently than funds paid for the other properties.

Adding the three additional properties to the allegations of Count XXXII does not introduce any new issues to this proceeding, nor does it alter the underlying theory behind the complaint.[29] Horizon was put on notice by complaint counsel's trial brief that complaint counsel intended to offer proof that the continued retention of funds as to all of Horizon's properties was an unfair trade practice.

Horizon was accorded every opportunity to offer evidence relevant to the allegations of the complaint, and after being put on notice of complaint counsel's trial intentions, offer evidence to rebut complaint counsel's case-in-chief. Thus, Horizon has not been prejudiced by complaint counsel's failure to move to formally amend the complaint. **[286]**

As to the substantive allegation of Count XXXII, the retention of the sums paid for lots having little value as investments and little use as homesites, the Commission recently considered such an allegation in *The Raymond Lee Organization, Inc.,* Docket 9045, Opinion of the Commission, pp. 29–36 [92 F.T.C. 489]. In the *Raymond Lee* matter,the Commission considered the value of

[29] See *Capitol Records Dist. Corp.*, Dkt. 8029, Interlocutory Order Remanding Motion To Amend Complaint For Determination Of The Hearing Examiner, 58 F.T.C. 1170, 1174.

services rendered in light of what was promised by the respondents in advertising, promotional and sales pitches. The Commission concluded:

> In our view, the record convincingly demonstrates that respondents provide worthless services that bear little resemblance to what they tout in their advertising, promotional, and sales pitches. These unfair and deceptive practices are exacerbated by respondents' acceptance and retention of the substantial fees that inventors pay in the reasonable hope and expectation that respondents will provide the expert assistance they represent. We conclude that the complaint allegations have been sustained. (Opinion of the Commission, p. 36).

In the instant matter Horizon touted its property as an excellent investment. There is a gross disparity between what the investor received for his money and what Horizon led the investor to believe. While it may be assumed that land has some intrinsic value, under consideration here is the value of the land as an investment, the product which Horizon was selling. The record clearly has shown that the land is actually a bad to worthless investment.

Horizon contends that the exchange privilege whereby a purchaser could exchange an undeveloped lot for a developed lot in the building area, gives Horizon's lots value as homesites (RPF, pp. 183–84). The record establishes that the exchange privilege has added no value to the undeveloped lots. This privilege has had no impact on the pace of building in Horizon's properties. It is evident that the exchange privilege cannot accommodate all the lot purchasers with a building site. Thus, the exchange privilege does not give value to Horizon's undeveloped lots as homesites. Moreover, Horizon's undeveloped lots were not sold as homesites, but as investments that could be resold to a demand market in a short time at a substantial increase in price.

The complaint allegations have been sustained. Horizon has sold thousands of undeveloped lots having little value as investments and little value as homesites and has retained the sums paid and has refused to refund the sums and failed to offer to refund the sums.

H. Jurisdiction

Congress granted the Federal Trade Commission jurisdiction to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce, and more recently, in or affecting commerce. 15 U.S.C. 45. Horizon's acts and practices as a corporation in the sale of land in interstate commerce bring it within the Commission's jurisdiction to determine whether the acts and practices in question were unfair or deceptive. [287]

Horizon states that primary jurisdiction over the interstate sale of land is vested in the Office of Interstate Land Sales Registration (OILSR) of the Department of Housing and Urban Development (HUD). Horizon maintains that this jurisdiction of OILSR bars action on the part of the Federal Trade Commission (RPF, pp. 399–408). The Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.* (1968), and regulations, 24 CFR 1700 *et seq.*, promulgated thereunder, are basically registration acts requiring developers to disclose. In conjunction with its duty to administrate the registration of subdivisions to be sold in interstate commerce, OILSR has the ability to seek both civil and criminal penalties for violations of the Land Sales Act. 15 U.S.C. 1709, 1717. Yet, neither OILSR's regulations prohibiting false or misleading advertising, nor its ability to judicially seek compliance for violations, renders OILSR exclusively in charge of protecting the public interest in the area of sales of subdivided land.

Nowhere in the ILSFDA is there an express grant of exclusive jurisdiction. In the absence of such an express grant of exclusive jurisdiction, where two acts cover the same subject, rules of statutory construction favor giving effect to both acts and concurrent jurisdiction to the agencies empowered to enforce those acts. *United States* v. *Borden Co.,* 308 U.S. 188, 198 (1939); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350 (1963).

The ILSFDA itself indicates that there was no congressional intent to impliedly repeal the strictures of the Federal Trade Commission Act. 15 U.S.C. 1713 states:

> The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist in law or in equity.

When coupled with exemptions from the ILSFDA listed in Section 1702, surely this leaves room for the Commission to examine acts and practices in connection with interstate land sales for unfairness and deception, as well as for private citizens to seek remedies for fraud, duress or mistake.

The field covered by the Federal Trade Commission Act (FTCA) is not coterminous with the ILSFDA. Practices and acts which comply with the letter of ILSFDA may still function to deceive. The FTCA is a pervasive regulatory scheme which is not repugnant to nor even in conflict with the purposes of the ILSFDA. Thus, there can be no implied repeal in favor of the ILSFDA, and no exclusive jurisdiction in the OILSR.

Nor is the doctrine of primary jurisdiction applicable. As the Second Circuit Court of Appeals found in a case involving the

Federal Maritime Commission, (FMC) the FMC did not have primary jurisdiction because "no special expertise is necessary to resolve the issue presented; there were no technical words which required expert construction, nor are there complicated facts whose significance can be grasped only by expert analysts. Additionally, there are no circumstances here which addressed themselves to administrative discretion or the need for uniform decisional law." *United States* v. *Pan American Mar/Line Inc.,* 32 Ad. L.2d 946 (S.D.N.Y 1972). **[288]**

What is in question here is not a complex construction of the Land Sales Act and regulations (although there do appear to be some violations of those clear and explicit regulations), but a combination of acts and practices which were unfair and deceptive to the public. OILSR has been granted jurisdiction over a registration statute and the authority to prosecute for non-disclosure and false and misleading disclosure; it does not have the primary mission of ferreting out unfairness and deception in the market place, which has been vested in the Federal Trade Commission.

This case presents no circumstances which necessitate the administrative expertise of the OILSR. The Commission is fully competent to proceed in this matter, which is concerned with an area of unfair and deceptive trade practices. The Commission thus has jurisdiction over the subject matter of this complaint.

I. Unfair Contractual Provisions

Horizon's contract contains several provisions which are unfair to purchasers; in particular, the forfeiture clause and the integration clause were oppressive and caused substantial injury to Horizon's customers. The unfairness of these provisions is amplified by the fact that these and other significant contract terms appear on the reverse side of the Agreement for Deed in a manner which does not apprise the purchasers of the importance of these terms. The training manuals have no instructions to sales representatives to explain the forfeiture provision to customers, and there is no testimony in the record by sales representative or customers that this provision was a part of sales presentations.

(1) *Horizon's Adhesion Contract*

It is important to bear in mind that Horizon's form contract constitutes a contract of adhesion—a contract in which one party must adhere to the whole contract as presented or forego entering into any contract. Horizon's contracts did not permit parties of equal strength to bargain for contract terms, a practice which is tradition-

ally considered the essence of a contract. Rather, Horizon presented the customer with a highly refined product prepared by experts—a printed contract whose terms benefitted Horizon, and it was presented to the customer on a take it or leave it basis.

The fact that Horizon's contract was an adhesion contract is important because, as Administrative Law Judge Paul R. Teetor concluded *In the Matter of Amrep Corp.*, Docket No. 9018 (July 18, 1979), the standards of fairness to be applied and the legal consequences which ensue depend in a large part on the method of contracting.

(2) *Integration Clause*

An integration clause forecloses any question about the completeness or integration of a written contract; the clause formally prohibits the contradiction of any terms in the written contract by any **[289]**prior agreement or contemporaneous oral agreement. Although the parol evidence rule would generally prohibit tampering with the written terms of any bargained contract, those contracts which contain integration clauses make the finality of their terms explicit.

However, in the case of an adhesion contract, no bargaining has occurred. To treat such a one-sided contract with the same deference the law pays to a fully integrated contract, which is intended as the final expression of the parties' bargained-for agreement, is an absurdity. There is no agreement or "meeting of the minds" in Horizon's adhesion contract. The record herein establishes beyond any doubt that oral representations of the investment quality of Horizon's land was the most persuasive constituent of Horizon's sales scheme. Customer testimony would indicate that they considered statements by sales representatives to be part of the contractual agreement (Tr. 915, 940, 942, 1171, 1392–94, 1426, 1563, 1594, 1659–60, 5010, 5016, 5018, 5021, 5187, 6108, 6116, 6369, 6437, 16651–52).

In light of the high pressure sales tactics used by Horizon's sales representatives and the Draconian terms of its contracts, it is not reasonable to assume its customers knew and understood the nature and consequence of the contracts they signed. Respondent's inclusion of an integration clause, rendering all representations and agreements between Horizon sales representatives and respective customers unenforceable, was oppressive, unscrupulous and unfair, and causes substantial injury to consumers.

(3) *Forfeiture Clause*

Horizon included a forfeiture clause in its contract that permitted it to terminate the purchaser's interest on default and retain all previously paid installments. A substantial number of contracts and sums of money have been forfeited under the Horizon contract (Findings 129–131). It will never be known how many customers continued making payments because of the Hobson's choice presented by the forfeiture clause. Although forfeiture clauses in installment contracts are legal in a majority of jurisdictions, they are unfair to the purchaser. Dobbs, *Remedies* Section 12.14 (1973). Upon forfeiture, the seller receives the benefit of the land and all previous payments; he is unjustly enriched at the expense of the purchaser.

In an effort to reach equitable results, an increasing number of states have departed either legislatively or judicially from the ancient common law rule of forfeiture. By preventing forfeitures, installment land sales contracts are brought into line with mortgages and installment sales of goods under the Uniform Commercial Code. Neither mortgage law nor the U.C.C. permits forfeiture, but limit the seller to his actual damages. Dobbs, *Remedies* Section 12.14(1973), U.C.C. Section 2–718.

Limiting recovery to actual damages is more compelling where the contract containing the forfeiture clause is an adhesion contract. In this case the stronger party, Horizon, has secured for itself a remedy for contract breach that far exceeds its anticipated actual damages. Had this been a liquidated damages clause, it would have been struck down as a penalty because it bears no relationship to anticipated damages. **[290]**

The penal nature of the forfeiture clause, particularly in combination with the duress of an adhesion contract, is indicative of the oppressiveness of forfeiture and the unfairness of Horizon's forfeiture clause. Concluding that the forfeiture provisions of Horizon's contracts are unfair represents a departure from an old and oppressive rule; yet, it does not break new ground, for equity has long abhorred a forfeiture.

J. Horizon Is Liable For The Unfair Or Deceptive Acts Of Its Sales Representatives

In reports filed with the Securities and Exchange Commission, ("SEC"), Horizon has reported that its sales representatives are full-time employees (CX 64D, 65E). For the fiscal year ended May 31, 1974, Horizon reported to the SEC that "the Company's own sales organization" accounted for 98 percent of its sales (CX 66C). Thus,

the relationship between Horizon's sales representatives and Horizon Corporation is that of principal and agent. Horizon, having clothed its sales representatives with apparent authority in the form of contracts, TBA maps, unit maps, property reports, films, presentation manuals, and Horizon-sponsored dinner parties, is responsible for their sales representations even if unauthorized. *Goodman* v. *F.T.C.,* 244 F.2d 584, (9th Cir. 1957). (The technical form of the relationship is not determinative; in a similar sales situation a corporation was liable for the acts of its jobbers considered independent contractors. *Star Office Supply Co.,* 77 F.T.C. 383, 446–46 (1970)).

Horizon points to the integration-disclaimer clause of its contract claiming exculpation from liability and lack of apparent authority in the sales representatives. It is clear from customer testimony that they perceived the representations of sales representatives as those of Horizon. Mere disclaimer clauses cannot absolve Horizon of the continuous and significant, both in substance and number, of misrepresentations made by its sales personnel. It is clear from the internal surveys of its sales offices that Horizon knew of these unfair and deceptive acts and practices and tacitly condoned them. In fact, testimony about sales training and the training manuals themselves show Horizon as the initiator of many of the unfair acts and practices.

Even if it were to be found that Horizon honestly and systematically dismissed sales representatives who violated their pledge, this would not exonerate Horizon of liability. As the Second Circuit Court of Appeals noted in *Standard Distributors, Inc.* v. *F.T.C.,* 211 F.2d 7, 13 (2d Cir. 1954): "unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act."

K. Neither Laches Nor Equitable Estoppel Bar Relief

The issuance of an order in this case is not barred by the equitable defenses of laches and equitable estoppel. As the Commission recently noted *In the Matter of SKF Industries, Inc.,* Docket No. 9046, Opinion of the Commission, p. 8 n. 8 [94 F.T.C. 6 at 83] (July 25, 1979), neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 408–09 (1917); *Times Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 623–24 (1953); *United States* v. *Firestone Tire & Rubber Co.,* **[291]**374 F. Supp. 431, 433 (N.D. Ohio 1974). The Commission's investigation of Horizon, which commenced in October 1971 (CX 65D), is of signifi-

cance to this proceeding in that Horizon, knowing it was under investigation, failed to take significant steps to correct its misleading and deceptive sales programs. Horizon's internal surveys alone constitute sufficient evidence to demonstrate that there has been no discontinuance of the unfair and deceptive practices prior to issuance of the Commission's complaint.

L. Remedy

It is well established that the Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices," and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist." *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611, 613 (1946). The courts have repeatedly affirmed the power of the Commission to go beyond the specific violations found and to prohibit similar practices, *FTC* v. *Mandel Bros. Inc.,* 359 U.S. 385, 392–93 (1959), "so that its order may not be by-passed with impunity." *FTC* v. *Ruberoid, Co.,* 343 U.S. 470, 473 (1952). The Order entered herein is necessary to achieve the objective of preventing unfair, misleading and deceptive sales practices in the future.

Horizon suggests that any order exempt (i) property which is exempt from the scrutiny of OILSR pursuant to 15 U.S.C. 1702, (ii) single transactions in which the purchase price is greater than $25,000, (iii) parcels of 50 acres or more in size, and (iv) lots for which utilities are or will be available within a date certain and upon specified conditions (Respondent's Reply To Complaint Counsel's Proposed Order, pp. 12–13). Such exemptions are not justifiable. It is clear that the purchaser of large quantities of land is not immune from deception; indeed, large purchasers may be more in need of the protection provided by this Order since the ILSDA does not require disclosures on large parcels. The public interest is not served, nor Horizon's unfair or deceptive acts or practices stopped, by placing such limitations on the scope of this Order.

In consideration of Horizon's contention that the order should be limited to undeveloped land which is subject to no obligation to develop (Respondent's Reply To Complaint Counsel's Proposed Order, p. 11), the scope of the Order has been limited to vacant land, undeveloped land, predeveloped land, or any other land which is not immediately available as a building site with utilities in place or under construction. This limitation is intended to exclude from the coverage of the Order, building lots with houses constructed thereon,

or with utilities in place and available for immediate building purposes.

Section I

Section I of the Order consists of three subsections which order Horizon to cease and desist from (A) making 15 specific representations, (B) referring to 8 listed topics, and (C) engaging in 9 listed acts or practices. Although a number of these prohibitions are far reaching, the findings would indicate that such unfair and deceptive conduct by Horizon **[292]**was instrumental in persuading customers to purchase Horizon property. The breadth of these prohibitions is a reasonable preventative measure against new but similar unfair or deceptive sales schemes which would enable Horizon to by-pass with impunity this Order.

Section II

The provisions of Section II affirmatively require Horizon to notify prospective purchasers of the potential risks and the material facts regarding the purchase of land from Horizon, and to offer a refund or exchange where there has been a material failure to provide a contracted-for improvement.

Paragraph II A, "Notice To Buyers," provides consumers with basic factual information about the offered property two days prior to any in-person sales contact. The two-day period permits the consumer to assess the merits of the property without being subject to Horizon's sophisticated sales techniques and sales pressures. The Notice informs consumers in an objective way that (1) the topic is land sales; (2) the location and average cost of the land being sold; (3) the uncertainty of investment value or ability to resell; and (4) the availability and cost information for the following improvements: roads, water, sewers, electricity, telephone service and recreational facilities. At its conclusion, the "Notice To Buyers" states the advisability of seeking professional assistance and of reading the property report.

Paragraphs II B and C verbally and physically incorporate the "Notice To Buyers" into the sales contract.

Paragraph II D states the method and terms of a refund procedure in the event that Horizon has failed to provide contracted for improvements within six months of the time specified in the contract. This provision, to be included in all contracts, requires affirmative notification on the part of Horizon, which is justifiable under the circumstances of a failure to meet contract terms.

Section III

Section III requires Horizon to disclose the risky nature of land investment and the purchaser's right to reconsider and cancel the contract during a period of insulation from Horizon's sales representatives. The terms of the adhesion contract are cleansed of some unfairness by prohibiting the integration and forfeiture provisions.

Paragraph III A requires Horizon to "clearly and conspicuously" include in all sales and promotional materials a specified warning about the uncertainty of land values and of resale potential. Such an unequivocal disclosure about the risks in purchasing land should mitigate any conflicting implications of land as an excellent, risk-free investment.

Paragraph III B requires Horizon to incorporate into its contract a clause granting a right of cancellation within ten days after signing the contract. To insure that the purchaser can truly reflect on the sagacity of his purchase, all communications from Horizon must cease during the ten-day period. Other provisions insure that purchasers have knowledge of and do not waive or forfeit their cancellation right. **[293]**Horizon is required to include a separate paragraph calling the purchaser's attention to the ten-day period; to include two copies of a separate form entitled "Notice Of Right Of Cancellation"; to orally notify purchasers of the right to cancel; and to notify purchasers so that they can cure any deficiency in the "Notice Of Right Of Cancellation."

Where an exchange privilege exists, Paragraph III F requires Horizon to specifically disclose the fact that building exchange lots may increase purchaser indebtedness and may not be in desirable locations.

Paragraph III G institutes a mandatory refund privilege conditioned on the purchaser making a personal visit to the property within one year. Although this provision turns Horizon's refund privilege from an optional to a mandatory one, requiring that Horizon provide a personal visit-refund provision is not unreasonable in light of the time limitation imposed, Horizon's unfair and deceptive acts and practices in the past, and Horizon's chosen method of selling its land sight unseen to buyers located at great distances from the property.

Despite the fact that Horizon routinely included a personal visit-refund provision coupled with a property visit credit in its contracts, the record shows that few people exercised this refund option and in fact often were reloaded when they did make a property visit, even though they were not satisfied with their original purchase. To

protect against a reoccurrence of the above situation, Horizon is required to: (1) clearly disclose the terms of the refund privilege, (2) provide the purchaser with a specific "Notice Of Cancellation After Inspection," and (3) refrain from communicating with the purchaser during the five-day refund period subsequent to the property visit.

Paragraph III H requires Horizon to make public the names and addresses of purchasers of its lots. This will enable the public, including builders, to contact lot purchasers about the purchase or sale of the property. It takes away the monopoly which Horizon has on the names and addresses of lot purchasers prior to recording a deed to the property.

Subsections I through L of Section III go to remedying the evil of forfeiture in Horizon's adhesion contract. Horizon will be permitted to collect or retain only its actual damages both in future contracts and in contracts which are in existence as of the time this Order becomes final. This Order does not grant complaint counsel's requested retroactive relief for contracts in which forfeitures have occurred prior to the effective date of this Order. In light of *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974) and 15 U.S.C. 57(b), such restitution is not ordered. However, failure to grant administrative relief in the form of restitution should not be considered indicative of a failure of Horizon's customers to qualify for relief; rather, the Commission should seek judicial redress for penal forfeitures in accordance with 15 U.S.C. 57(b).

In addition, Horizon is prohibited from enforcing the integration clause of its contract. The record shows a substantial number of material representations made apart from the written contract. These representations were unfair and deceptive and were relied on by **[294]**purchasers. Purchasers should not be prevented from using these representations as proof in any contract dispute with Horizon or in any subsequent litigation.

Paragraph III N authorizes a letter (Appendix A) be sent to all purchasers of Horizon's land. The letter serves to inform purchasers of this lawsuit and of the rights and options open to them.

Section IV

Section IV requires a change in the management structure of the HCIA's. Horizon is prohibited from controlling the management of the associations and is thereby prevented from utilizing the resources of the HCIA's for its own benefit. Further, HCIA members are given the opportunity to postpone payment of HCIA assessments until the lot being assessed is ready for development. Payments over

a forty-year period on a lot which may never be developed is particularly onerous. Further, HCIA payments to an association by those who have forfeited on their lots, and have no interest whatsoever in the development should be refunded. These payments are in an escrow account, are readily available for refunds, and refunds seem just and proper.

Section V

Section V requires Horizon to inform its present and future agents and affiliates of the contents of this Order. It further commands Horizon to police the activities of its agents and affiliates to insure compliance with this Order. In light of Horizon's past history of failure to prevent misrepresentations by its sales force, this section is both reasonable and necessary.

While the notice and disclosure requirements of this Order duplicate in some respects information in the property reports, such additional disclosures are obviously necessary since the property reports have not apprised purchasers of all information material to a decision to purchase respondent's land.

Redress

The Commission has stated in its complaint that it may seek redress for injury to consumers in the form of restitution and refunds for past, present and future consumers, and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act, as amended (15 U.S.C. 57(b)), if the record of this proceeding, and other factors, make such course of action necessary and appropriate. For this reason, full redress for consumers has not been ordered by the undersigned. However, it is recommended that the Commission now proceed under Section 19(b).

The record in this proceeding reveals a course of conduct filled with deliberate misrepresentations and the withholding of material information from consumers. The end result of this planned course of conduct was to appropriate from consumers millions of dollars for virtually worthless desert land that was represented to be an excellent **[295]**investment. This entire sales scheme was made with deliberateness and with the knowledge of its falsity, and it unjustly enriched a few at the expense of thousands of unsuspecting consumers. Commission redress for these helpless victims of a vicious consumer fraud is not only warranted, but may be the sole remaining hope for any consumer relief.

345-554 O—82——50

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

2. The challenged acts, practices and methods of competition of respondent are in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

3. Respondent Horizon Corporation has engaged in the sale of land, located in the States of Texas, Arizona and New Mexico, and has utilized in connection therewith false, misleading, deceptive and unfair representations and acts and practices, and has failed to disclose to purchasers material information in respect to such land.

4. Through the use of the aforesaid unfair or deceptive acts or practices, respondent has caused purchasers of its land to pay substantial sums of money to it for land that has little value as investments and little use as homesites, and has received and retained such sums of money and has failed to offer to refund or refused to refund such money to such purchasers.

5. The use by respondent of the aforementioned unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are true, and into the purchase of substantial amounts of respondent's land because of said mistaken and erroneous belief.

6. The aforementioned acts or practices were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. **[296]**

Order

I

It is ordered, That respondent Horizon Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, contracting or other promotion of vacant land, undeveloped land, predeveloped land, or any vacant land which is not immediately usable as a building site with utilities in place or under construction, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing, directly or by implication, through the use of any means, that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment;

2. There is little or no financial risk involved in the purchase of respondent's land;

3. The resale of land purchased from respondent is not, or **[297]** will not be difficult;

4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, *unless* such is a fact, and *unless* the terms, conditions and arrangements for repurchase, resale, or assistance are clearly and conspicuously disclosed at the time such representation is made;

5. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise;

6. Lots designated by respondent as "single-family residential", "multi-family residential", "commercial", or terms of similar import have a significant difference in present or expected value;

7. The price set by respondent for the land is equivalent to the market value of the land, *unless* adequate market data on resales of similar land (land in a similar location with the same degree of development) by previous purchasers in the possession of respondent substantiates this representation;

8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money;

9. The purchase of land in general is a good, profitable, safe or sound investment; **[298]**

10. The demand for land offered for sale by respondent has increased, is increasing, or will increase;

11. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing;

12. Purchasers must purchase immediately in order to ensure that a particularly desirable location will be available, or that lots similar to those being offered for sale may not or will not be available at the same price in the forseeable future;

13. Purchasers have been specially selected;

14. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is

not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided,* that respondent may accurately recite the terms and conditions of the contract and of a refund privilege, if any, or of a cancellation right, if applicable; **[299]**

15. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in prices, including reference by actual dollar amount, percentage increase, or by any other means as indicative of market value, or of a change in market value;

2. The past, present or future population, employment or industrial statistics or trends or other statistics or trends in a geographic area, unless respondent has a reasonable basis at the time of the statement or representation to conclude that such statistic or trend either now has or, within the near future, will have a significant effect on respondent's property or a part thereof, other than those parts of each property which respondent has reserved for development, to which such statement or representation refers or relates;

3. The present, planned, proposed or potential development, improvement or facilities of the particular land being offered or of the subdivision or project in which the offered land is located that **[300]**differs in any material respect from the relevant language of the most current property report or from the "Notice to Buyers" (set forth in Part II of this Order);

4. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment;

5. The purchase, reservation, contracting or consideration by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to, any reference to any other person having a "hold" on a lot;

6. Respondent's reputation, size, assets or listing on any stock exchange; *provided,* that respondent may make such references as are required by statute or regulation in the place and manner required by such statute or regulation;

7. The present, planned, proposed or potential development of any land by anyone other than respondent;

8. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means: **[301]**

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with the purchase decision or the purchase of respondent's land;

2. Failing to provide any required federal or state property report sufficiently in advance of the signing of a contract so as to enable the purchaser to read it completely without interruption or distraction by respondent's representatives or employees;

3. Filling out a contract with the purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he desires to purchase the land being offered;

4. Subjecting a purchaser who has evidenced a desire not to purchase respondent's land to continued sales effort from any sales representative or other employee other than the original sales person, *i.e.,* any continuation of the "T.O." or "takeover" system;

5. Including in any contract or in any other documents shown or provided to purchasers, language stating that no express or implied representations have been made in connection with the sale of respondent's land, or that any particular representation has not been made in connection therewith;

6. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any **[302]**material respect from the rights or obligations of the parties as stated in the contract of sale, the Notice to Buyers provided for in Section II of this Order, and the property report;

7. Including any contract language permitting respondent to retain all sums previously paid by the purchaser upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract;

8. Failing to disclose, clearly and conspicuously, in all sales presentations, promotional materials, contracts and advertising relating to specific lots the existence, nature, location, size and significance of any and all easements, and any other physical features which could affect the full use and enjoyment of a lot;

9. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours.

II

It is further ordered, That respondent Horizon Corporation shall:

A. Distribute to all purchasers a copy of the following "Notice to Buyers" at least two days prior to any in-person sales contact. (1) In **[303]**cases where the purchaser is invited by mail to attend a meeting sponsored by respondent, the Notice shall be included with the invitation. (2) In cases where respondent arranges to meet with the purchaser in the purchaser's home, or other location, respondent shall mail the Notice to the purchaser allowing sufficient time for the Notice to arrive two days prior to the meeting. (3) In cases where the initial contact with the purchaser is in-person (as, for example, at a booth located in a public place) respondent shall, after identifying briefly the purpose of the contact, give the Notice to the purchaser, request that the purchaser read it, and provide ample uninterrupted time for the purchaser to read it completely before continuing with any sales presentation. (4) In cases where the sale is to be completed entirely through the mail, the Notice shall accompany the initial mailing to the purchaser. The Notice shall be on a separate sheet of paper not attached to any other paper and shall contain only the required information and no other writing, unless approved in advance by the Commission. The Notice shall be in the following format and content:

NOTICE TO BUYERS

NAME OF SUBDIVISION
NAME OF SELLER
EFFECTIVE DATE OF NOTICE

THE PURPOSE OF [DESCRIBE THE TYPE OF MEETING OR CONTACT] IS TO PERSUADE YOU TO SIGN A CONTRACT FOR THE PURCHASE OF LAND IN [NAME OF STATE] AT AN **[304]**APPROXIMATE COST OF [AVERAGE LIST PRICE FOR THE LOTS BEING OFFERED], OF AN AVERAGE SIZE OF _____ ACRE(S), WHICH IS A COST PER ACRE OF $ _____ .

IMPORTANT

THE SELLER ADVISES YOU THAT IT IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS A FINANCIAL INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. THE FUTURE VALUE OF LAND IS VERY UNCERTAIN. EVEN IF THE DEVELOPMENT PROCEEDS ON SCHEDULE, YOU WILL FACE THE COMPETITION OF THE SELLER'S OWN SALES PROGRAM IF YOU OFFER YOUR LOT FOR SALE. THIS USUALLY INVOLVES AN EXTENSIVE SALES CAMPAIGN BY THE SELLER AND MARKETING COMMISSIONS WHICH YOU MAY NOT BE ABLE TO MATCH. YOU MAY ALSO FACE THE POSSIBILITY THAT REAL ESTATE

BROKERS MAY NOT BE INTERESTED IN SELLING YOUR LOT OR LISTING YOUR LOT FOR SALE.

[State the number of lots sold in the subdivision by the seller from the initial sale to the date of this Notice. State the number of unsold lots currently available for sale. State the number of lots which the seller intends to offer in the future to complete sales in the subdivision.]

[PROVIDE the following development information for the unit(s) being offered:]

ROADS

(INFORMATION TO BE APPLICABLE TO THE ROADS FRONTING PURCHASER'S LOTS) **[305]**

State who is currently responsible for construction and maintenance and whether the roads will be maintained by a public authority, a property owners' association or some other entity at some time in the future. State the cost to buyer for construction/maintenance, if any, during interim and after turnover.

State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the roads as represented. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE ROADS; THEREFORE, THERE IS NO ASSURANCE THAT THEY WILL BE COMPLETED.

Provide the following roads information:

Unit	Starting date	Percent now complete	Estimated completion date*	Present surface	Final surface**

* If not known, insert the following warning: WARNING: THE PLANS FOR THE ROADS ARE SO INDEFINITE THEY MAY NOT BE COMPLETED.
** If unpaved then state "UNPAVED" and describe the surface. **[306]**

WATER

If water is to be supplied by an individual private system, state the estimated cost to the buyer of installation, treatment facilities, necessary equipment and any other required costs. If individual wells are to be used, state whether or not a refund or exchange will be issued in the event a productive well cannot be installed. If yes, state the terms and conditions thereof. If no, insert the following warning: WARNING: A SUCCESSFUL PRODUCING WELL IS NOT GUARANTEED. NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO DIG A SUCCESSFUL WELL.

If water is to be provided by a central system, state whether the buyer is to pay any construction costs, one-time connection fees, availability fees, special assessments or

deposits for the central system. If so, state the estimated cost. If the buyer will be responsible for construction costs of the water mains, state the costs to install the mains to the most remote lot covered by the Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL WATER SYSTEM; THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED. [307]

Provide the following water information:

Unit	Starting date	Percent now complete	Service Available date*

* If not known, insert the following warning: WARNING: THE PLANS FOR THE CENTRAL WATER SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

SEWER

State the method of sewage disposal to be used. If by septic tank or other individual system, state the estimated cost of the system and any necessary tests. State whether a permit is required. If so, and if each and every lot has not been already approved, insert the following warning: WARNING: THERE IS NO ASSURANCE PERMITS CAN BE OBTAINED FOR THE INSTALLATION AND USE OF SEPTIC TANKS OR OTHER INDIVIDUAL ON-SITE SEWAGE SYSTEMS. State whether or not a refund or exchange will be issued in the event a permit is denied for the particular lot purchased, and the terms and conditions thereof. If neither will be issued, insert the following warning: WARNING: NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO INSTALL A SEPTIC TANK OR OTHER ON-SITE SEWAGE SYSTEM.

If a central sewage treatment and collection system is being installed, state who is responsible for construction of the system. State whether [308]buyer will pay any construction costs, special assessments, one-time connection fees, availability fees, use fees or deposits. State the amounts of these charges. If the buyer is to pay the cost of the sewer mains, state the cost of installation of the mains to the most remote lot in this Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL SEWER SYSTEM; THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED. Provide the following sewer information:

Unit	Starting date	Percentage of completion	Service Availability date*

* If not known, insert the following warning: WARNING: THE PLANS FOR THE CENTRAL SEWAGE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

ELECTRIC SERVICE

If the primary service lines have not been extended in front of, or adjacent to each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges [309]for extension of primary lines. Based on that policy, state the cost to the buyer for extending primary service to the most remote lot in this Notice. Provide the following electric service information:

Unit	Starting date	Percentage complete	Service Availability date*

* If not known, insert the following warning: WARNING: THE PLANS FOR THE ELECTRIC SERVICE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

TELEPHONE SERVICE

If the service lines have not been extended in front of, or adjacent to, each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges for extension of service lines. Based on that policy, state the cost to the buyer of extending service lines to the most remote lot in this Notice. [310]

Provide the following telephone service information:

Unit	Starting Date	Percentage complete	Service Availability date*

* If not known, insert the following warning: WARNING: THE PLANS FOR THE TELEPHONE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

RECREATIONAL FACILITIES

Identify each recreational facility. For each facility, provide the following information:

Facility	Percent complete	Date of start of construction	Date Available for use*	Financial Assurance of completion**	Buyer's cost and assessments***

* If not known, insert the following warning: WARNING: THE PLANS FOR THE (identify the facility) ARE SO INDEFINITE IT MAY NOT BE COMPLETED.
** If none, state "none". If such exists, state the type and amount.
*** State any construction or use costs to the buyer including any [311]applicable property owner's association assessment, maintenance assessment or use fee.

At the conclusion of the Notice, place the following warning set off by a box outline: IMPORTANT, OBTAIN AND READ THOROUGHLY THE FULL PROPERTY REPORT BEFORE SIGNING ANYTHING. THE PROPERTY REPORT CONTAINS ADDITIONAL INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE CONTRACTING TO PURCHASE THIS LAND. IT IS DESIRABLE TO SEEK THE ASSISTANCE OF COUNSEL OR A QUALIFIED REAL ESTATE PROFESSIONAL FOR ASSISTANCE IN EVALUATING THE TERMS OR MERITS OF THIS PURCHASE *BEFORE* SIGNING ANYTHING. RETAIN THIS NOTICE—REPRESENTATIONS CONTAINED IN IT BECOME A PART OF ANY CONTRACT YOU MAY SIGN WITH THE SELLER.

If you wish to obtain more information or if you wish to cancel any appointment we may have arranged with you, you may call this toll-free number: 800 _____ .

–(End of Notice)–

B. Include in all contracts of sale the following provision:

The representations and statements made by seller in the Notice to Buyers and in the Property Report regarding roads, utilities, improvements and recreational facilities are hereby incorporated into, and made a part of this contract as if set forth fully herein. [312]

C. Attach to the contract a copy of the Notice to Buyers that was given to the purchaser when the purchaser was first contacted by respondent.

D. Include in all contracts the following provision:

In the event the subdivision or the lot which is the subject of this contract has not been provided with or does not have available any contracted-for improvement or utility, or there has been a material failure to provide or make available any contracted-for recreational facility, amenity or structure, within six months of the time specified in the contract, the seller will, within 30 days after the expiration of the six-month time period, provide the buyer by certified mail, return receipt requested, with notice of such failure to provide or such unavailability, and of the buyer's right to a refund of all moneys paid (including, but not limited to principal, interest, taxes, and assessments) under the contract, plus interest at the rate of 7 percent per annum computed from the date of seller's default.

Provided, however, That at the time the purchaser is notified of such

refund, the purchaser may also be offered the option of selecting, instead of such refund, an exchange of the purchaser's lot, at no additional cost to the purchaser for another lot to which all contractual obligations of **[313]**seller have been met, which was or would have been of at least equal price on the date the purchaser's contract was signed, which is located in the same subdivision, has the same zoning classification, has the same utilities and improvements as seller was obligated to provide under the original contract, and is located no further from the same or substantially similar recreational and commercial facilities and amenities as the original lot. Where the buyer has received a deed or other evidence of interest in the property other than this contract, purchaser may be required, as a condition of obtaining a refund, to return such deed or other evidence of interest.

E. Carry out the notification and refund provisions as set forth in Paragraph D above and, in connection therewith not solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon the right of a purchaser to a refund as set out in Paragraph D of this Order, except that respondent may require a purchaser to exercise his option for a refund within a stated time period of not less than forty-five days after receipt by the purchaser of the Notice required by Paragraph D of this Order.

III

It is further ordered, That respondent Horizon Corporation shall:

A. Include clearly and conspicuously in all sales presentations, promotional materials, printed advertisements and radio and television commercials, the following statement: **[314]**

THE FUTURE VALUE OF LAND IS VERY UNCERTAIN. THE SELLER ADVISES YOU THAT IT IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS A FINANCIAL INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. IT IS SUGGESTED THAT YOU DISCUSS ANY POSSIBLE PURCHASE WITH A LAWYER, REALTOR OR OTHER QUALIFIED PROFESSIONAL.

B. Include clearly and conspicuously in each contract for the sale of respondent's land the following statement, in 12-point boldface type:

YOU, THE BUYER, HAVE THE RIGHT TO CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

SHOULD YOU CHOOSE TO CANCEL WITHIN THIS TIME, ANY PAYMENTS

MADE BY YOU UNDER THIS CONTRACT WILL BE RETURNED AND ANY LEGAL DOCUMENT SIGNED BY YOU WILL BE CANCELLED AND RETURNED, WITHIN TEN BUSINESS DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE.

TO CANCEL THIS CONTRACT, YOU MUST MAIL OR DELIVER A SIGNED COPY OF THE 'NOTICE OF RIGHT OF CANCELLATION' (THAT WILL BE FURNISHED BY THE SELLER), OR SEND A TELEGRAM, OR SEND ANY OTHER WRITTEN NOTICE OF CANCELLATION TO SELLER AT SELLER'S [315]PLACE OF BUSINESS. A MAILING MUST BE POSTMARKED, OR A TELEGRAM MUST BE FILED FOR TRANSMISSION, NOT LATER THAN MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

During this ten-day period after the signing of a land purchase contract all communications, personal, telephonic or otherwise, between respondent and purchaser are forbidden and the initiation of any such communication by respondent shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable anytime before the purchased land is fully paid for and deeded to purchaser.

C. Print the following in 12-point boldface type as a separate paragraph of the contract immediately preceding the space provided for the purchaser's signature:

ATTENTION: WHILE YOU HAVE 10 BUSINESS DAYS IN WHICH TO RECONSIDER YOUR DECISION AND CANCEL THIS CONTRACT WITH FULL REFUND, WE RECOMMEND THAT, *BEFORE SIGNING,* YOU CONSIDER YOUR NEEDS CAREFULLY AND HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, REAL ESTATE AGENT OR OTHER QUALIFIED PROFESSIONAL.

D. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in 12-point [316]boldface type "NOTICE OF RIGHT OF CANCELLATION," which shall contain in 10-point boldface type the following information and statements:

_____

Date of Transaction

_____

Lot Identification(s)

_____

Contract Number

NOTICE OF RIGHT OF CANCELLATION

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT. USE THIS TIME TO EXAMINE WITH CARE THIS CONTRACT AND THE PROPERTY REPORT. YOU SHOULD ALSO USE THIS TIME TO HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, REAL ESTATE AGENT OR OTHER QUALIFIED PROFESSIONAL.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY [317]DOCUMENT YOU SIGNED WILL BE RETURNED WITHIN TEN BUSINESS DAYS AFTER THE SELLER RECEIVES THIS CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [name of respondent], AT [address of respondent's place of business] POSTMARKED (if mailed) OR FILED FOR TRANSMISSION (if telegraphed) NOT LATER THAN MIDNIGHT OF _____. [Date]

I (WE) HEREBY CANCEL THIS TRANSACTION.

(EACH BUYER MUST SIGN THIS NOTICE.)

_____ _____

[Date] [Signature of buyer(s)]

–(End of Notice)–

Respondent shall, before furnishing copies of this "Notice of Right of Cancellation" to the purchaser, complete both copies by entering the name of respondent, the address of the respondent's place of business, the date of the transaction, the contract number and lot identification(s), and the date, not earlier than the tenth business day following the date of the signing by the purchaser, by which the purchaser may give notice of cancellation.

Respondent shall, where the signature of a purchaser is solicited during [318]the course of a sales presentation, inform each purchas-

er orally, at the time the purchaser signs the contract, of the right to cancel as stated in this Paragraph of this Order.

E. Honor any signed and timely notice of cancellation by the purchaser, and within 10 business days after the receipt of such notice, (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

Whenever a timely notice of cancellation is received and said notice is not sufficient or proper in any manner, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the third business day following the purchaser's receipt of the mailing, if the purchaser is to obtain a refund.

F. Whenever respondent extends a privilege or other right whereby the purchaser may exchange the undeveloped land for a building lot, respondent shall:

1. Include in all materials, including the contract, which discuss the privilege or right, or if such privilege or right is described orally, include in such oral discussion, and in a concurrently delivered written notice, the following statement: BUILDING EXCHANGE LOTS EQUAL IN SIZE [319]AND COST TO THE LOT YOU ARE PURCHASING MAY BE LOCATED SUBSTANTIAL DISTANCES FROM THE ESTABLISHED DEVELOPED AREAS, AND THEY MAY HAVE LESS DESIRABLE ROADS, UTILITIES AND APPEARANCE SO THAT YOU MAY WISH TO EXCHANGE FOR OTHER MORE ATTRACTIVE BUILDING LOTS THAT THE SELLER MAY OFFER. THESE OTHER LOTS MAY BE SMALLER IN SIZE AND MAY REQUIRE YOU TO PAY MORE MONEY THAN YOU ARE NOW CONTRACTING TO PAY; and

2. State the specific financial terms or formula for exchange of the purchaser's equity in the original lot into the building lot, in the same place and manner as the statement in subparagraph 1 above.

G. Whenever respondent sells property site unseen it shall extend a refund privilege conditioned upon the purchaser making a personal visit to the property within one year after purchase and notifying respondent within five days after inspection that a refund is desired. Respondent shall:

1. Provide the purchaser with a copy of the following "INSPEC-

TION AND REFUND PRIVILEGE NOTICE" at the time the contract is signed. The Notice shall be on a separate sheet of paper containing no other writing. The Notice shall be worded as follows: **[320]**

INSPECTION AND REFUND PRIVILEGE NOTICE

Personal inspection of any land purchase is highly desirable. If you should decide to inspect your purchase in accordance with the requirements of the refund privilege, you should be aware that it will be in seller's interest during the visit to encourage you to retain your property and to perhaps purchase additional land or trade for a more expensive parcel. Therefore, you may encounter additional sales presentations.

You should take the time during your inspection to visit the local area and examine the real estate market where the property is located. You should, on your own, contact local independent real estate agents for information.

In the event you decide to cancel this purchase, you will not be reimbursed by seller for your travel expenses.

THIS INSPECTION AND REFUND PRIVILEGE IS IN ADDITION TO AND DOES NOT TAKE AWAY YOUR 10-DAY CANCELLATION RIGHT. SEE YOUR CONTRACT.

–(End of Notice)– **[321]**

2. Provide the purchaser five business days *after* making the personal inspection within which to request a refund.

3. Include in any contract, in immediate proximity to the provision setting forth the availability of this refund, the following statement: YOU, THE BUYER, HAVE UNTIL MIDNIGHT OF THE FIFTH BUSINESS DAY AFTER THE CONCLUSION OF YOUR IN-PERSON INSPECTION IN WHICH TO NOTIFY THE SELLER OF A DECISION TO CANCEL. YOU MAY CANCEL THE ORIGINAL PURCHASE AS WELL AS ANY PURCHASE MADE DURING THE INSPECTION VISIT. NO REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS FIVE-DAY PERIOD.

4. Ensure that every purchaser who seeks to make this inspection visit sees the precise lot identified in the purchaser's contract.

5. Orally inform the purchaser of this post-visit 5-day cancellation right at the time the contract is signed and again at the

conclusion of the inspection visit; the visit shall be deemed to conclude:

a) after the purchaser has inspected the precise lot contracted for; and,

b) at the end point in the visit or tour when all contact with the purchaser by any employee or representative of respondent terminates. [322]

6. Furnish each purchaser, at the conclusion of the inspection visit (as determined in Paragraph G 5 above), with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION" which shall contain in boldface type of a minimum size of 10 points the following statements:

NOTICE OF CANCELLATION

AFTER INSPECTION

Date of conclusion of inspection tour of property

Lot Identification(s)

Contract number(s)

YOU MAY CANCEL YOUR CONTRACT(S) WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE FIFTH BUSINESS DAY AFTER THE ABOVE DATE. NO REPRESENTATIVE OF SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS FIVE DAY PERIOD. IF ANY REPRESENTATIVE OF SELLER DOES CONTACT YOU, PLEASE NOTIFY SELLER AT THIS TOLL-FREE NUMBER: 800 _____ .

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY LEGAL DOCUMENTS YOU SIGNED WILL BE RETURNED TO YOU WITHIN 10 BUSINESS DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE. [323]

TO CANCEL YOUR CONTRACT(S), MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: (Name of Respondent), AT *(address of respondent's place of business),* POSTMARKED (IF MAILED) OR FILED FOR TRANSMISSION (IF TELEGRAPHED) NOT LATER THAN MIDNIGHT OF _____ .

I (WE) HEREBY CANCEL THE ABOVE-DESCRIBED CONTRACT(S). (EACH BUYER MUST SIGN THIS NOTICE.)

_____

(Date)

_____ _____

(Buyer's signature) (Buyer's signature)

7. Before furnishing the purchaser copies of the "Notice of Cancellation After Inspection" set forth in Paragraph G6. above, complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property, the identifying contract numbers and the date, not earlier than the fifth business day following the conclusion of the inspection (as determined in Paragraph G5. above), by which the purchaser may cancel the purchase(s). **[324]**

8. During the post-inspection cancellation period all communications, personal, telephonic or otherwise, between respondent and the purchaser are forbidden and the initiation of any such communication by respondent shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable anytime before the purchased land is fully paid for and deeded to purchaser.

9. Investigate any notification received from purchasers of contact violating the provisions of Paragraphs G3. and G8. above, and comply with the requirements of Section V, Paragraphs F and G herein.

10. Honor any signed and timely Notice of Cancellation After Inspection by a purchaser, and within 10 business days after the receipt of such Notice (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

11. Where a timely Notice of Cancellation After Inspection is received purportedly in accordance with the requirements of this section, but where said notice is not sufficient or proper in some manner and respondent does not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the **[325]**purchaser must be mailed by midnight of the fifth day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

H. Unless otherwise requested by the purchaser, promptly record, with the appropriate authority of the county in which the land is located, all contracts for the purchase of respondent's land, and take such steps as may be necessary to advise such county authority from time to time of the last known mailing addresses of the purchasers under such contracts, but in no case later than the end of the calendar month following that in which respondent

becomes aware of any change in such mailing addresses. Once a lot is deeded, Horizon's obligation hereunder shall expire.

I. Include in all contracts for the sale of land a provision limiting the amount of moneys to be forfeited by a purchaser in the event of the purchaser's default under the contract to an amount not greater than respondent's actual damages from such forfeiture.

J. Refund to purchasers who are deemed in default after the effective date of this Order all moneys paid under the contract, including but not limited to principal, interest, taxes, and assessments which in the aggregate exceed respondent's actual damages within 60 days after the purchaser is deemed to have defaulted; *provided,* that this paragraph shall not preclude respondent from offering a defaulting purchaser additional alternatives which may be selected at the purchaser's option, in lieu of a refund. For purposes of this section of the Order, a purchaser shall be deemed to have defaulted when either of the following occurs: **[326]**

1. purchaser notifies respondent of intent to default; or
2. purchaser has failed to make a payment for a period of six months from due date of such payment.

K. Forbear from relying upon or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any purchaser the following contract clauses:

1. Respondent's contract clause which provides that the seller may retain all sums previously paid by purchaser in the event that the purchaser fails to pay any installment due or otherwise to perform any obligation under the contract; and
2. Respondent's contract clause to the effect that no express or implied representations have been made in connection with the sale other than those appearing in the contract.

L. Not misrepresent, nor solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon, the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation. **[327]**

M. Include in all contracts of sale of land a provision insuring free alienability of the purchaser's interest therein and extending the contractual rights and privileges of the purchaser to subsequent purchasers or assignees from the purchaser.

N. Mail to all purchasers of respondent's land, both those who are deeded and those who are under contract for the purchase of

such land, regardless of whether or not they are in default, the Notice attached to this Order as Appendix A.

IV

It is further ordered, That respondent shall:

A. With respect to any improvement association, however designated, which has jurisdiction over any land within any of respondent's subdivisions:

1. Take such actions, including the casting of all of respondent's votes and the soliciting of votes from purchasers of land known to be members of a given association if necessary, as are needed to call a special meeting of the members of said association no later than 60 days after this Order becomes final. **[328]**

2. Take such actions as are needed to notify all members of said association of the purposes and proposals to be made at such meeting as specified in subparagraph (3), and recommending that they vote for such proposals; *provided further,* that such notice shall be clear and conspicuous, shall be sent to all members by first class mail not later than 30 days before the scheduled date of such meeting and shall include no information other than the information contained in subparagraph (3).

3. Propose at any such meeting called pursuant to subparagraph (1), the following amendments in the articles of incorporation and by-laws of each such association as may be needed to accomplish the following:

(a) A limitation on the holding of positions on the Board of Directors, any Committee or as an officer of said association by anyone who, while serving in that position, is or has been a director, officer, employee, agent or representative of respondent or any of its subsidiaries or divisions to less than a majority of Board members. **[329]**

(b) Elimination from such by-laws and articles any powers, such as to extend utility lines, which the association has not and is not likely to use because of adverse effects on its non-taxable status.

(c) Postponement of the annual charges and assessments by each undeveloped lot owner until such time as water, sewer and electric utilities are in place in the street in front of each lot, or until such time as the utilities have been contracted for and the date of installation is certain.

(d) Refund of all HCIA charges paid by any purchaser whose

contract has been forfeited or cancelled, together with a refund of a pro rata share of any interest earned on such payments to the date of refund.

(e) If (c) above is adopted, postponement of a purchaser's right to vote on association business until such time as the purchaser is liable for payment of charges and assessments. **[330]**

4. Cast all of respondent's votes in favor of all of the amendments in the articles of incorporation and by-laws which are described in subparagraph (3).

V

It is further ordered, That respondent Horizon Corporation shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future sales representatives and other employees, independent brokers, advertising agencies and others who sell or promote the sale of respondent's land or who otherwise have contact with the public on behalf of respondent;

B. Provide each person so described in Paragraph (A) above with a form to be returned to respondent, clearly stating that person's intention to conform his or her business practices to the requirements of this Order;

C. Inform each person described in Paragraph (A) above that respondent shall not use any such person or the services of any such person, unless such person agrees to and does file notice with respondent that he or she will conform his or her business practices to the requirements of this Order;

D. In the event such person will not agree to so file notice with respondent and to conform his or her business practices to the require**[331]**ments of this Order, respondent shall not use such person or the services of such person;

E. Inform the persons described in Paragraph (A) above that respondent is obligated by this Order to discontinue dealing with those persons who engage on their own in the acts or practices prohibited by this Order, or who fail to adhere to the affirmative requirements of this Order;

F. Institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in Paragraph (A) above conforms to the requirements of this Order, and promptly investigate and resolve any complaints about such persons received by respondent, and maintain records of such complaints, investigation and disposition for five years from the date of the disposition of the complaint;

G. Discontinue dealing with any person described in Paragraph (A) above, revealed by the aforesaid program of surveillance, who more than once engages on his own in the acts or practices prohibited by this Order; *provided, however,* that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondent in any proceeding brought to recover penalties for alleged violation of any other paragraph of this Order;

H. Create, maintain and staff a toll-free telephone number service that consumers may employ during regular business hours to request information, to cancel an appointment or to notify respondent of a **[332]**complaint. Provide this number in the space provided in the Notice to Buyers (Section II herein) and in the Notice of Cancellation After Inspection (Section III, Paragraph G6. herein).

VI

It is further ordered, That in the event respondent transfers all or a substantial part of its business or its assets to any other corporation or to any other person, including a transfer of all or part of the ownership interest of any or all respondent's wholly-owned subsidiaries, respondent shall require said transferee to file promptly with the Commission a written agreement to be bound by the terms of this Order; *provided,* that if respondent wishes to present to the Commission any reasons why said Order should not apply in its present form to said transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

VII

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its subsidiaries.

VIII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a **[333]**successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

IX

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Appendix A

IMPORTANT NOTICE TO LOT BUYERS IN (Name of Subdivision)

The Federal Trade Commission is sending this letter to all (insert subdivision) lot buyers. It contains facts you should know about your purchase and about the seller.

In 1975, the Federal Trade Commission brought a lawsuit against Horizon Corporation, the parent company of (insert subdivision). This letter is part of the order issued when the lawsuit was decided.

Please read this letter carefully and consider the alternatives suggested in Part II. The Commission cannot advise you as to which decision is best for you.

I. *LOT VALUE AND RESALE*

There is virtually no resale market for (insert subdivision) lots which have not been developed with utilities. If your lot is presently undeveloped, it is unlikely that you would be able to resell it now except at a substantial loss. The extent of community development and population growth in the particular area of (insert subdivision) where your lot is located will determine whether or not you could resell your lot once it is developed. The population growth and community development necessary to enable you to sell your lot at or near the price you paid or are paying for it may not occur for many years, if at all. If the lot may be exchanged for a developed lot, there may be some small demand by builders for a limited number of such lots at the present time.

You should be aware that Horizon is not obligated in any way to buy back your lot or help you resell it.

II. *OPTIONS AVAILABLE TO PURCHASERS*

There are a number of options available to you at this time which you should review based on the information provided in this notice.

1. You can continue making your payments.
2. You can refuse to make any further payments and perhaps take a tax loss. According to the FTC Order you *cannot* be required to pay any more money, but if you elect this option, you will lose your land and all the money you have paid. However, if

you purchased your lot as an investment and not for your own use as a homesite, you might be able to declare the money you lost as a tax loss, deductible from your income on federal and state tax returns. It is suggested strongly that you contact your local District Director of the Internal Revenue Service *before* deciding whether to stop payments, if your decision is based on the possibility of taking a tax loss. Whether your loss is deductible will be based on your specific situation and you should *not* rely on this letter as authority for a deduction.

3. You can stop making payments and seek satisfaction against Horizon in a private lawsuit. You should consult an attorney before electing this option. The Commission's Order may be relevant in such a suit and your attorney should obtain a copy.

4. You can relocate to (insert subdivision) and, if possible, build on your lot or exchange for a building lot if so permitted by your contract or by company policy. You may, however, be required to pay more money for this exchange lot. Check with the company for details.

If you have any questions about the contents of this letter, write to me. Please do not telephone.

If you have questions about your account, or the development of your specific lot, call Horizon toll-free at ( ). A representative will return your call. Instead of calling, you may wish to write to:

( )
(Insert respondent's address)
( )

In any letter, you should include your name as set forth in your contract, your account number, your lot identification number, your current address and telephone number, and the name of the subdivision in which your lot is located.

Sincerely,
Attorney

Opinion of the Commission

By Bailey, *Commissioner:*

The Horizon Corporation is a land sales company incorporated under the laws of Delaware, with its principal office in Tucson, Arizona. At the time of this proceeding, it was engaged in the business of buying large parcels of unimproved land, developing core residential areas within those parcels, and selling the remaining unimproved lots to the public to be held primarily as investments. The large parcels of Horizon properties that were the subject of this case are Horizon City, near El Paso, Texas; Waterwood, near Houston, Texas; Rio Communities and Paradise Hills, near Albuquerque, New Mexico; Arizona Sunsites, near Tucson, Arizona; and Whispering Ranch, near Phoenix, Arizona. With the exception of Waterwood, which partially fronts Lake Livingston, Texas, Horizon's

properties are located in desert regions. As of May 31, 1976, the combined land area of these properties was 440,000 acres, or 687.5 square miles, and 280,200 acres had been sold. (*See* I.D. 8–22)[1] [2]

In marketing its properties, Horizon relied on national advertising, dinner parties held for potential purchasers, and in-home sales solicitations. The complaint alleges that during its marketing presentations, the respondent committed unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (FTC Act or Section 5), by making false and misleading representations to potential buyers of its land, by failing to disclose material facts and by using "high pressure" sales tactics. The heart of the complaint lies in counts I and II, which charge that Horizon marketed its undeveloped properties as excellent investments with little or no financial risk when in fact those properties were financially risky investments both because their future value was uncertain and because purchasers would probably be unable to sell their lots at or above the purchase price at the time of represented liquidity. (*See* I.D.p. 1) Other complaint counts, which will be discussed below, allege specific misrepresentations through which Horizon conveyed the net impression of its "excellent, financially risk-free" marketing theme.

The proceedings in this case were lengthy, lasting over 80 days; the record includes nearly 17,000 pages of transcript and 2,500 exhibits; and the proposed findings and briefs exceed 1,000 pages. Administrative Law Judge (ALJ) Ernest G. Barnes issued an Initial Decision, containing 295 pages and 137 findings of fact. He found that representations alleged in the complaint occurred in a significant number of Horizon's sales presentations, and that the net impression created by those representations was that Horizon property was an excellent, short-term investment with little or no financial risk. Based upon extensive expert testimony concerning the actual value

[1] The following abbreviations will be used in this opinion:

I.D.	–	Initial Decision finding number
I.D.p.	–	Initial Decision page number
Tr.	–	Transcript page number
CX	–	Complaint Counsel's exhibit number
RX	–	Respondent's exhibit number
RAB	–	Respondent's appeal brief
CAB	–	Complaint Counsel's appeal brief
R. Ans	–	Respondent's answering brief
C. Ans	–	Complaint Counsel's answering brief
R. Rep	–	Respondent's reply brief
C. Rep	–	Complaint Counsel's reply brief
RPF	–	Respondent's proposed findings
CPF	–	Complaint Counsel's proposed findings

of Horizon land vis-a-vis its represented value, Judge Barnes concluded that this net impression was both false and misleading. (I.D.p. 256)

Respondent appealed the Initial Decision, arguing that the weight of the evidence is insufficient to establish liability. Complaint counsel cross appealed, seeking several substantial changes in the order entered by the ALJ. Oral argument was heard on May 8, 1980. During the argument, Commissioner Bailey asked respondent's counsel whether the parties had considered settling the case. Counsel responded that they had, but that he had agreed with complaint counsel not to mention that fact during the oral argument. (Oral Argument, Tr. 28)

On May 15, 1980, Commissioner Bailey received a letter from respondent's counsel (with copies to all participating Commissioners and complaint counsel) stating that settlement discussions had been revived. However, the Commission continued to consider the case and prepare its opinion on the merits because it did not have before it any motion to withdraw the case from adjudication so that the terms of an appropriate settlement could be considered. [3]

On November 26, 1980, the Commission received a "Joint Motion for Stay of Proceedings" from the parties requesting a stay in the Commission's consideration of this matter for seventy-five (75) days so that counsel for both sides could "finalize the remaining provisions of a proposed consent order for submission to the Commission." The Commission granted this motion in part, stating that no opinion would issue during the 75-day period but that it declined to stay consideration of the case. On February 17, 1981, the parties requested a twenty-one (21) day extension of the stay; the Commission also granted this request. On March 9, 1981, complaint counsel filed a "Motion for Leave to Modify Appeal." The motion stated that complaint counsel sought leave to modify their appeal from the Initial Decision. The proposed modification would "substitute proposed amendments to the findings, conclusions (of law) and order in the initial decision." Complaint counsel stated that they "seek leave to proceed in this manner so that this matter may remain in litigation for determination of legal and factual issues by the Commission." Simultaneously, respondent filed a "Response to Motion for Leave to Modify Appeal" which stated that respondent "consents" to complaint counsel's motion and that respondent intends to "withdraw its appeal from the initial decision and waive all appeal rights if the Commission accepts no later than May 15, 1981, the findings, conclusions and order to be proposed in complaint

counsel's modified appeal." The Commission granted complaint counsel's request for leave to submit a modified appeal.

On March 24, 1981, complaint counsel submitted its "Modification of Appeal" (hereinafter "proposed modifications"). Simultaneously, respondent submitted a "Response to Modification of Appeal" stating that, while it continues to assert that "evidence in the record does not support any findings or conclusions that respondent violated Section 5 of the Federal Trade Commission Act . . ., should the Commission accept the findings and conclusions substantially as offered by complaint counsel, or otherwise finds that the Act was violated, respondent joins complaint counsel in recommending the cease and desist order proposed by complaint counsel." However, respondent stated that it conditioned its recommendation on issuance of a final order (or an order subject only to public comment) by the Commission not later than May 15, 1981. On April 10 and April 14, 1981, at the request of the Commission, the parties filed briefs addressing some of the issues raised by the proposed modifications.

On April 24, 1981, the newly appointed Director of the Bureau of Consumer Protection,[2] filed a motion requesting additional changes in the order recommended by complaint counsel and respondent and asked that the Commission give respondent 10 days to respond to those suggestions. After reviewing the cease [4]and desist order recommended by the parties, and the Bureau Director's proposed changes, the Commission decided to make several modifications in the order's provisions before considering its final issuance. On April 30, 1981, the Commission directed the parties to submit briefs addressing the changes it had made in the cease and desist order they had recommended. These briefs were submitted on May 8, 1981.

After considering all briefs and the parties' proposed modifications, as well as the entire record developed in this case and the Initial Decision, the Commission has decided to issue this opinion and the attached order. The Commission agrees with the ALJ's holding that respondent has violated Section 5 in several respects. We largely concur in his Initial Decision, and with certain modifications discussed below and enumerated in Appendix A to this opinion, the Commission adopts findings of fact numbers 1 through 137.

The opinion set forth here is the product of the Commission's independent consideration of the record in this case. While the Commission has given due consideration to the proposed modifications of the findings of fact and conclusions of law submitted by

[2] James H. Sneed, the actual appointee to the position of Bureau Director, recused himself from this matter and the Deputy Director of the Bureau, Linda Colvard Dorian, acted in his behalf.

complaint counsel, and adopted those which it believes to be appropriate, the final conclusions of law entered here reflect changes in the Initial Decision which the Commission believes are supported by its review of the record as a whole.

As regards the order recommended by complaint counsel and respondent, the Commission has made modifications in some provisions but has substantially adopted the overall remedial scheme suggested by the parties. This scheme, taken as a whole, adequately addresses the violations of Section 5 committed by Horizon. However, the Commission notes that since the remedial scheme was developed in the context of respondent's offer to withdraw its appeal if the Commission adopted complaint counsel's proposed modifications of the ALJ's order, the Commission will not necessarily view this remedial scheme as a model for relief in future land sales cases.

The Commission's discussion of the violations committed by Horizon will focus first on the nature of Horizon's representations concerning the investment potential of its land, and second on whether those representations were true.[3] In brief, we conclude [5] that Horizon marketed its land as an excellent, risk-free, short-term investment when in fact the investment potential of this land has not been and will not be realized in the time frames represented.

In addition, this opinion will discuss the role of so-called "high pressure" tactics in the sale of Horizon land, finding that some of these tactics constitute deceptive trade practices because they occurred in the context of deceptive misrepresentations concerning the land's value as an investment.

This opinion will also address the complaint allegations concerning the unfairness of five standard provisions included in Horizon's land sales contracts. The Commission upholds the ALJ's finding of liability with respect to one of these provisions—the forfeiture clause, but reverses his findings of liability regarding the other four

[3] Although six separate Horizon properties were under investigation in this proceeding, the evidence presented at trial was structured more toward proof of company-wide violations than toward individual analyses of the six different properties. As a result, the ALJ found liability for all of the properties without separating out the evidence for each property individually.

In analyzing the record evidence concerning what representations were made, the Commission will also adopt a company-wide approach because we have been able to determine that Horizon's marketing approach was substantially similar for all six properties which are the subject of this proceeding. The record evidence on representations includes testimony of consumers as well as former sales representatives, training manuals, newspaper advertisements and celebrity promotional films. Consumer and sales representative testimony touched on virtually every property and reveals a substantially similar marketing approach to each. Training manuals, advertisements and celebrity promotional films further document Horizon's official policy and also reveal a unified marketing approach. However, when the Commission analyzes the truth of the representations made, we will consider each property separately. The six properties differ in several key respects (e.g. location, size, terrain, degree of development etc.). To sustain a conclusion that any given property is not in fact an "excellent, risk-free investment", we must analyze the evidence pertaining to the investment value of each individually.

provisions—the integration clause, property visit credit, guarantee and exchange privilege.

The Commission then considers the various general defenses raised by respondent, concluding that none individually, nor all collectively, should bar its findings of liability and entry of an order in this case.

Finally, the Commission rejects respondent's assertion that it does not have jurisdiction over the instant case and concludes that its jurisdiction over Horizon's land sales practices is complementary but not coterminous with that of other federal and state agencies. **[6]**

I. REPRESENTATIONS

The first step in determining whether Horizon violated Section 5 is to review the substantial record evidence concerning what representations Horizon made to consumers interested in purchasing its land. These representations define the nature of the investment consumers thought they were obtaining, and provide the framework for analyzing whether this investment is in fact what Horizon said it would be. A review of this evidence indicates that, through false and misleading representations and material omissions of fact, Horizon left prospective purchasers with the net impression that the land they were buying was an excellent, financially risk-free investment which would mature over a short-term.[4]

Horizon's typical sales presentation relies on a technique that it calls "funnelling": an approach that is designed initially to interest a prospect in investments and in land generally, then to focus the presentation on Horizon's various properties, next to narrow the focus to a single property, and, finally, to center on the specific lot that the sales representative is authorized to sell. (I.D. 39; I.D.p. 256) The representations alleged in the complaint are most easily understood if put into the context of a typical "funnelled" presentation.

The starting point in Horizon's marketing approach was an attempt to convince prospective investors that the safest and most financially rewarding investment possible is land. (I.D. 39 and 49) Horizon's sales representatives bolstered their sales pitch by comparing the investment value of land to the value of all other major types of investments. Consumers and former sales representatives testified at trial that prospects were repeatedly assured that their lots would

[4] The Commission does not intend to rigidly define "short-term" or "long-term" investment. Respondent defines long-term as greater than twenty years. (*See, e.g.*, RX 67) For purposes of this opinion we will accept that definition of long-term, and define as short-term any representations that an investment would mature in less than twenty years.

appreciate in value at a higher rate than other types of investments such as stocks, bonds, savings accounts and insurance, and that the rate of appreciation would outpace inflation. (I.D. 49; *see, e.g.,* CX 527c, w; Schuman, Tr. 5245; Kelly, Tr. 16431; and RPF 138; complaint counts I, II, and XXXI) To graphically convey this "fact" regarding land generally, Horizon's sales representatives frequently invoked a concept referred to as the "four pillars of investment." (*See, e.g.,* Schuman, 16431) Tr. 5244–45; Kelly, Tr. The four pillars represent stocks and bonds, savings accounts, insurance, and land. Sales representatives told prospects that regardless of which of these four investments they placed their money in initially, their money would always end up in land. Horizon claimed that this result was assured because the sophisticated investors who float stocks and [7] bonds, and who control banks and insurance companies, know that land yields the highest profits. Prudence therefore demands they commit their money to the purchase and development of real estate. (I.D. 49)

Horizon sales representatives, as well as Horizon's promotional materials, repeatedly stressed Federal Housing Administration (FHA) statistics, showing a 20 per cent/per annum increase in the value of land nationally between 1946 and 1968. (I.D. 51)[5] One Horizon training manual refers to these statistics as "the most powerful selling tool ever devised." (CX 962a) The FHA statistics reflect the average appreciation of land throughout the country, from unimproved city lots to suburban and rural acreage. In applying these statistics to its own unimproved lots located in sparsely populated areas, Horizon made no effort to qualify their value as an accurate projection of the appreciation Horizon investors could expect. Although accurate in and of themselves, the FHA statistics were used to create the thoroughly misleading impression that government figures projected a return of 20 per cent/per annum on Horizon land.[6]

Horizon also trained many of its sales representatives to cite specific examples of extraordinary profits that had been made in the past on land in the United States, especially examples of tremendous profits that had been made on land in the locality where the sales presentation was being made. (I.D. 50, 53–55) Some of these examples

[5] The use of these statistics was deemphasized in 1972 and eliminated from respondent's sales presentations in 1974. (I.D. 51)

[6] It is a long-established principle of Section 5 law that "words and sentences may be literally and technically true and yet framed in such a setting as to mislead and deceive." *Bockenstette v. FTC,* 134 F.2d 369, 371 (10th Cir. 1943). Thus, in *P. Lorillard Co. v. FTC,* 186 F.2d 52, 58 (4th Cir. 1950), the Court stated:

> To tell less than the whole is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.

included extraordinary profits that had allegedly been made on land purchased from Horizon. However, these claimed "profits" were calculated by comparing the escalating prices Horizon charged for its land over the years rather than any profits realized by consumers in the resale of their [8]Horizon lots. The use of atypical claims of profit made on land, even if true, can be misleading (and therefore deceptive) in the absence of a disclosure that such profits may be atypical.[7]

Once sold on a "smart" investment in "choice" land, the prospect was then directed to Horizon land.[8]

When the sales presentation "funnelled" to Horizon land, four general assertions served as the cornerstones of respondent's investment theme: (1) the rate of population growth in the southwestern United States would increase dramatically; (2) the increased population would settle in and around Horizon properties; (3) population growth would spur community development, which in turn would act as a catalyst for the establishment of an active resale market; (4) as a consequence of development and resale, the purchaser's investment would mature within a short-term. (Complaint counts III, IV, VI, VII, and VIII)

All four cornerstones are found in Horizon promotional films narrated by celebrities Merv Griffin or Leif Erickson. The films were regularly shown at Horizon's promotional dinner parties. (I.D. 36) They were also frequently shown during in-home sales presentations, or else representations similar to those in the films were conveyed to prospects by sales representatives. (I.D. 39)[9] The thrust of the representations, as stated in the Merv Griffin film, is that "investors in Horizon land can be assured that they are investing in the very best type of profit potential land." (CX 527z–17) Both the films and the sales representatives stated that Horizon properties were located in growth areas of the Southwest, that by the year 2000 the population of the United States would increase from 200,000,000 to 300,000,000, and that most of that increased population could be expected to settle in and around growth cities such as El Paso, Houston, Albuquerque, [9]Tucson and Phoenix. (*See, e.g.,* CX 527)

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[7] *See, e.g., National Dynamics Corp.*, 82 F.T.C. 488, 564–65 (1973), *aff'd in part and remanded in part*, 492 F.2d 1333, 1335 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974), *modified on remand*, 85 F.T.C. 391, 393–94 (1974), *reconsideration*, 85 F.T.C. 1052, 1053–54 (1975).

[8] Although the Initial Decision primarily addresses issues relevant to Horizon's properties, the law judge did find, and we affirm, that Horizon had no basis to represent that land is generally superior to all other forms of investment, or that land will always appreciate in value at a rate higher than the rate of inflation. (*See* I.D.pp. 265–66).

[9] These films were one of Horizon's most effective sales tools. The Commission's screening of representative copies of the films expedited our consideration of this case. Transcripts of the films' dialogue appear at CX 526 and 527. For a description of the films, *see* I.D. 46 and 87.

Horizon's promotional literature characterized these cities as lying in the "path of people and progress." (*See, e.g.,* CX 274)

Horizon's dinner parties and in-home sales solicitations also featured representations concerning the growth capacity of its communities. For example, CX 858 is a script used by Horizon's dinner party speakers at various times in the Denver, Colorado, area. During those parties, prospects were told that according to a Presidential Commission the population explosion would require the building of "a new community of 250,000 every forty days," and that such new communities would "develop on the outskirts of existing [growth cities.]" (CX 858f) Speakers added that investors who own land on the outskirts of these existing cities would profit as their property becomes absorbed for development. (CX 858f–g)

Horizon further represented through written, oral, and visual media that dramatic population increases, coupled with "locked-in" growth corridors in the El Paso and Albuquerque metropolitan areas, would lead to development, resale, and profitability of lots in Horizon City and Rio Communities within a relatively few years. (*See, e.g.,* CX 527z–3) These representations were intended to convey the impression that El Paso and Albuquerque could grow only in the direction of Horizon's properties, or that "almost all" or "most" of the growth of these cities would be toward Horizon's properties. Thus, these properties would develop quickly and profitably for lot owners. Respondent's promotional campaign stressed that in all of North America, only three existing cities have "locked-in" geographic corridors that allow population growth to occur "in one direction and one direction only," and two of these cities are El Paso and Albuquerque. (CX 858g)[10]

Horizon's sales representatives claimed repeatedly that El Paso is one of the fastest growing cities in the United States and that natural and artificial barriers surrounding El Paso will cause growth to be locked-in toward the direction of Horizon City. These barriers include the Rio Grande River, which separates the United States from Mexico at a point southwest of the city to a point south of the city, the Franklin Mountains, which dominate portions of land north and northwest of the city, and Fort Bliss Military Reservation, which stretches to the northeast. Respondent concludes that as the population of El Paso grows toward Horizon City, an increasing demand for living space will confront a necessarily limited supply of land, resulting in appreciation of the land's value. (I.D. 75) **[10]**

Like El Paso, Albuquerque was represented to be a bustling city

[10] The other North American city represented to have a "locked-in" growth corridor is Vancouver, Canada. Findings relevant to Horizon's "locked-in" growth claims are summarized at I.D. 73 and 75.

with a "locked-in" growth corridor that leads directly to Horizon property. (I.D. 73) Sales representatives and promotional films informed consumers that natural barriers surrounded Albuquerque, creating a "fence" that constrained growth. The barriers included the Sandia and Manzano Mountains, three Indian reservations, three land grants, and a United States military installation, none of which, according to Horizon, was available for development.

When selling land in Rio Communities, sales representatives stated that growth could no longer occur within the "fenced" area, but that a freeway leading south from Albuquerque to Rio was a "gate" in that fence, and that because of the freeway growth would "leapfrog" the intervening barriers. (*See, e.g.,* I.D.p. 113) To graphically emphasize this point, sales representatives folded over promotional maps to demonstrate that Albuquerque was only three and one half "building miles" from Rio Communities. The ALJ summarized the situation as follows:

> Albuquerque is described as a dynamic, pulsating city with a wall surrounding it on all four sides, bursting at the seams, with more and more people arriving each and every day. A freeway was built to the south to relieve the pressure and it leads to Rio del Oro, a completely preplanned community. [As Horizon said]—"Doesn't this look like a money making situation" (CX 160X, Y, Z1). (I.D.p. 112)

The remaining part of the sales presentation concentrated on the final two cornerstones of respondent's investment theme: community development and resale markets, and the length of time until investment maturity. Former sales representatives testified at trial that when funnelling the presentation to a specific property they played up Horizon's corporate image as a "community developer." They represented alternatively that Horizon was one of the leading community developers in the Southwest, that it was one of the leading community developers in the nation, or that it was one of the leading community developers in the world. (I.D. 80) One advertisement, emphasizing that land is only as good as the company you buy it from, stated that Horizon had $150 million in assets, a net worth of $60 million and an inventory of land valued at $240 million. (CX 352) [11]

Sales representatives claimed that as a development company Horizon would establish residential areas, build country clubs and shopping centers, develop industrial and recreational parks, attract hospitals and universities, and set up improvement associations for continuing development. (I.D. 79–80; *see also* I.D. 81–83) Horizon representatives boasted that the company had retained a prominent planning firm, Gruen Associates, to "master plan" its properties, and that it had designated each lot within a property to be used for

specific residential or commercial purposes. (I.D. 79) During solicitations, consumers were presented with unit maps for each property that purported to show each lot and the specific, designated end use that each lot was assigned. (I.D. 78; I.D.p. 266) Prospects were also shown "TBA" maps, which are promotional maps printed by Horizon that depict the overall property "To Be Allocated," and its proximity to a neighboring city. Many of the "TBA" maps contain glossy photographs of residents enjoying themselves at recreational facilities in the property's core area. (*See, e.g.,* CX 206–10, 230–32) Presentation manuals used during in-home sales solicitations and celebrity films also include many attractive scenes of the Southwest and Horizon communities. (CX 195–197, 526–27) During property visits and fly-in tours, customers were shown through the developed core areas where there were homes, golf courses and other amenities. Many consumers were led to believe that the property they were purchasing would soon be part of such a community. (I.D. 67)

Horizon represented that it was obligated to build roads within eight years of purchase. (I.D. 80; *see, e.g.,* CX 932e, 949d) Images were conjured of properties criss-crossed with highways and secondary roads, and of communities humming with traffic and commerce. (*See, e.g.,* I.D. 78–80) However, as the ALJ found, "[as] to most of its properties, Horizon's only contractual commitment is to stake the lot and to cause a road fronting on the property to be completed within thirty days after the purchaser has completed his payments or approximately eight years from the date of signing the contract, whichever is later." (I.D.p. 10) The "roads" need be no more than bulldozed strips in the desert sand because Horizon is not contractually obligated to provide road surfacing or maintenance. (I.D. 80)

The record indicates that the net impression of consumers following sales presentations was that their lot would be provided with utilities by either Horizon, the community improvement associations, or some other "developer." (I.D. 83; I.D.p. 266; *see, e.g.,* CX 927f–g, 929i, 930g, 943a–b, 944e, 947f, [12]i, l, m, 948e)[11] These utilities are the key to any successful community development, for without them the "city" has no light and the desert land remains arid. Respondent failed to inform consumers that if neither Horizon, the improvement associations, nor any other developer were to install utilities, the cost to consumers of individually extending utilities to their lots would be prohibitive.[12] (*See, e.g., infra,* p. 32, note[33]; p. 37, note[39])

[11] A number of transcript pages cited in I.D. 83 have been renumbered. Pages 5925–26, 6180, 6202, 6213, 6296, 6477–78, 6486, and 6577 are currently pages 5204–05, 5459, 5481, 5492, 5577, 5760–61, 5769, and 5830, respectively. Transcript pages 5918–6567 (Volume 9017–2–7) have been renumbered 5197–5850.

[12] The record reveals that community improvement associations exist for Rio Communities, Paradise Hills,

(Continued)

The Commission agrees with the ALJ's finding that the net impression[13] created by Horizon's sales representatives was that roads and utility hookups to the consumer's property either [13] existed or would exist by the expiration of the land sales contract. (I.D.p. 266) The effect of these representations on consumers cannot be underestimated: roads and utilities mean the possibility of communities, communities mean resale, and resale means profit. Moreover, the incessant use of the terms "community" and "community developer" in Horizon's promotional literature and sales presentations had an undeniable capacity to mislead consumers into believing that Horizon was obligated to develop their property.[14] Horizon was characterized as a Herculean enterprise, registered on the New York Stock Exchange, that had the financial capability to carry out a development program, and the managerial responsibility and expertise to put such a development program into action.[15] Barbara Kelly, a former sales trainer and sales representative, succinctly made this point by describing the instructions from her own training:

> Don't sell dirt. It doesn't matter where people own land, as long as Horizon is involved. They are the people that are going to make it happen. They are not a land sales company but a development company. That is the way we felt. (Kelly, Tr. 16,432)

These representations of a developed community, one well thought out and planned in advance, complete with schools, hospitals, residences, parks, industry, country clubs, and a permanent improvement association, had the capacity to lead consumers to believe

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Horizon City and Waterwood. Under the land sales contract, membership is mandatory and annual membership fees in the range of $10–120 are assessed. (I.D. 81–83) Testimony at trial indicated that the tax-free status of the community improvement associations (other than the association established for Waterwood) may limit their activities. For example, the associations may not be able to install utilities without losing their tax exempt status. (Roach, Tr. 13194) Further, expert testimony confirms the conclusion that the associations' accumulation of funds to date cannot meet the financial requirements of an infrastructure sufficient to provide utilities for the Horizon properties where they exist. (I.D. 81–83) Nevertheless, sales representatives used the associations' general contribution to development as a sales tool. (I.D. 82) Thus, Horizon not only misrepresented the role the associations could realistically play in developing the properties, but deceptively failed to disclose material information about the limitations on their activities. (*See, e.g., The Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 649 (1978), *citing Portwood v. FTC*, 418 F.2d 419, 424 (10th Cir. 1969); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 891 (6th Cir. 1967); and *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963), *cert. denied* 375 U.S. 944 (1963))

[13] In making these determinations, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. (*See, e.g., Beneficial Corp. v. FTC*, 542 F. 2d 611, 617–18 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Continental Wax Corp. v. F.T.C.*, 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc. v. F.T.C.*, 329 F.2d 365, 367 (7th Cir. 1964); *Charles of the Ritz Distrib. Corp. v. F.T.C.*, 143 F.2d 676, 679 (2nd Cir. 1944))

[14] The ALJ found that Horizon's characterization of itself as a "community developer," and of its properties as "communities," were misleading but not false because "the evidence is undisputed that Horizon has spent millions of dollars in its several properties." (I.D. 79) We affirm this finding.

[15] *See, e.g.*, "Waterwood Training film," CX 169c. The film stated that, at the time of Waterwood's development, total investment by everyone concerned will be 2.5 billion dollars, and that "Horizon Corporation is one of the few community developers in the industry with the resources to undertake a development of this dimension."

that they were purchasing an excellent, financially risk-free investment, which would prove to be rewarding within a short-term.

Horizon defends against this charge by saying that it made no representations regarding its development obligations and that no contract document commits it to accomplish development. (*See, e.g.,* RAB 27–31) The assertion that no representations regarding development were made is belied by the record; the assertion that Horizon had no contractual obligations, even if true, misses the point. [14]

False verbal representations by a seller constitute deception within the meaning of Section 5. The fact that such representations are omitted from a written contract does not alter their status under Section 5.

The final level of Horizon's funnelling sales presentation was to concentrate on specific lots which were available for sale at the time of the presentation in question. Within each property,[16] Horizon zoned lots for three types of use: single family units, multiple family units, and commercial property. (I.D. 69–70; complaint counts VI, VII) Horizon represented that properties zoned for different uses had different values and could be expected to appreciate at different rates. For example, Ms. Kelly testified that she was trained to sell single family property as a modest investment with a good return, multi-family property as a more expensive but more rewarding investment, and commercial property as the "cream of the crop." (Kelly, Tr. 16,432) Lots were also platted as being along a streetfront, on a corner, or in a cul-de-sac. (I.D. 70) The latter two locations were represented to have a greater investment value. Locations near proposed highways and highway loops, schools or university sites, shopping centers and recreational areas were stressed when there was no assurance of when, if ever, such development would materialize. (I.D. 69) Horizon discovered that existing customers were a fertile source of new sales, and those customers were vigorously induced to trade existing property for property zoned for a different use in a different location, always property which was more expensive and which would require a longer time to pay off. (For a description of this "reloading" technique, *see* I.D. 68; Schuman Tr. 5253–54; *see also,* I.D. 39 and CX 927e, h, 929c, d, e, 932f, 936c, 937b, 938d, 939a, 943a–b, 947j, n, 950i, 951f, g) However, without development, the only way to tell the difference between the different types of lots was to use a surveyor's map—all were composed of arid land, far from buildings or utility lines, with few access roads or even fences to distinguish between them. (*See, e.g.,* I.D. 67)

[16] With the exception of Whispering Ranch.

The ALJ found that some Horizon lots, although zoned for residential or commercial uses, were rendered useless by natural phenomena such as arroyos, washes and flood plains. (I.D. 85–86) He further found that these unexpected risks were not disclosed to consumers. (Id.) The failure to disclose a significant risk **[15]**that the purchaser of a product cannot reasonably be expected to anticipate constitutes a material omission of fact and a violation of Section 5's prohibition on deceptive business practices.[17]

Because the resale of individual lots would constitute the final disposition of the investment, customers frequently inquired about the existence of a resale market. Training manuals prior to 1971 were silent as to resale, while training manuals after 1971 instructed sales representatives to explain to prospects that lots could be resold by listing them with local brokers. (I.D. 61; *see, e.g.,* CX 157v, 160) Despite the "official" policy after 1971 of prohibiting representations that Horizon would assist in resale, former sales representatives testified that they were trained to, and did, make representations to prospects that Horizon would aid purchasers in their resale effort. (I.D. 61; I.D. p. 261–62; CX 950e) Frequent representations were made that due to a large consumer demand Horizon property was selling at a brisk pace, assuring that investors would encounter no difficulty in resale on their own and raising the possibility of resale prior to the time of development. (I.D. 61–62) Some sales representatives went so far as to suggest to prospects that because Horizon was a development company it might seek to repurchase the lots directly in order to facilitate community planning. (I.D. 62; complaint count VIII) We believe the clear message communicated to consumers from these representations was that an active resale market was already in existence or that one would come into existence during the represented term of the investment. (*See, e.g.,* CX 927n, 932e, 936c, 944e, 946h, 947f, i, l, m, n, 955d)

In fact, as our analysis of the investment value of the six properties will illustrate, there was no resale market for Horizon land. (I.D. 123–128)

Pace of development and availability of a resale market were important to potential investors because those factors determined how long consumers would be required to hold their investment before it could be disposed of for profit. The record indicates that sales representatives were trained to, and did, make specific time frame representations regarding the short-term nature of the

[17] The Supreme Court has determined that in the context of an investment decision, facts are "material" if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway,* 426 U.S. 438, 449 (1976).

investment. (I.D. 53–60; I.D. pp. 259–60) The ALJ found that, "the time in which an appreciation in the price of Horizon's land could be realized was generally stated by sales representatives to be three to five years during the period 1968 to 1970. The **[16]**time period later was changed to seven to ten years, and there is some indication that more than ten years was used by sales representatives." (I.D.p. 259) The findings of the ALJ are amply supported by the record. The testimony at trial establishes that prior to 1971 sales representatives randomly predicted that customers' investments would mature within one to two years, or three to five, or five to seven. (I.D. 58–59)

Prior to 1971, Horizon's management was either ignorant of its sales force's representations, or else, in the face of brisk sales, it chose to ignore them. However, in approximately 1971, coincidentally the same time that the Federal Trade Commission began its investigation, Horizon management issued verbal new policy directives that its land was to be sold as an investment of at least twenty years. (I.D. 58; RAB 58–59; R. Rep 28–29) Former sales representatives testified at trial that it was virtually impossible to sell Horizon land as a twenty year investment, (I.D.pp. 59, 63) and that consequently representatives ignored the directive. (I.D. 58–59)

In 1973 respondent printed a brochure entitled "Principles of Land Ownership—A Policy Statement by Sidney Nelson, President, Horizon Corporation" ("Principles").[18] The "Principles" state that Horizon land is a long-term investment, defined as greater than twenty years. Horizon maintains that since 1973 it has trained sales representatives to make *no* representations regarding length of holding time, save that appreciation would be long-term. Training manuals printed after 1973 instruct sales representatives to respond to questions, concerning the amount of time before the investment would mature, with the answer that Horizon has no "crystal ball" and that it cannot predict the future. (I.D. 58) Horizon argues that since the introduction of its "Principles" in 1973, it has reformed its sales policies to omit time frame representations, so that even if misrepresentations had been made in the past, that problem has been corrected, making a Commission order in this case unnecessary. (*See,* I.D. 57–58; I.D.pp. 259, 268; RAB 58–59) However, the record shows that the vast majority of sales representatives failed to conform to this new policy. As late as 1975, representations were still being made that purchasers could realize specific profits within two to ten years, over the "short-term", or over the term of the contract (typically eight to ten years). (*See,* CX 927h, l, m. 928b, 929k, 930c, d,

[18] A text of the "Principles," RX 67 and 1551, is included in I.D.p. 54–56.

g, 932e, f, 936b, 938d, 942c, 943a–b, 944e, t, 946h, 947f, i, l, m, n, 949d, 950d, i, k, 951e, g, h, 955d.) Further, even if we [17]assume that Horizon management was successful in omitting references from sales presentations, and that this policy is currently in force, this policy does not cure the consumer injury caused by Horizon's failure to apprise investors that undeveloped Horizon land is not a short-term investment. To the extent purchasers are not adequately impressed with the fact of the extremely long-term nature of the investment—well into the twenty first century or beyond, as we find below—there is a deceptive omission of a material fact. Accordingly, even if Horizon successfully implemented this new sales policy, Horizon violated Section 5 of the FTC Act.

In addition to complaint counts I and II, which were affirmed by the ALJ, complaint counts III and IV charge that Horizon represented to consumers that their lots would be located within fully developed communities by the end of their eight to ten year land sales contract with Horizon, and that therefore, their investment would mature by that date. Our review of the record has disclosed that in most instances where time frame representations were made, purchasers entered into contracts with Horizon after being told that their investment would mature in ten years or less. (I.D. 58–59) In instances where sales representatives avoided time frame representations, consumers routinely inferred from the net impression of the presentation that maturity would be reached at the end of the eight to ten year period. (*See* I.D. 58–59; I.D.p. 259) Accordingly, we find that the record amply confirms the charges contained in complaint counts III and IV as to most of Horizon's sales. In the remainder of its sales, Horizon's representatives uniformly stated that the time until maturity would be ten to eighteen years. On the record before us, the Commission is hard pressed to find a significant number of Horizon sales where lots were represented as long-term assets.[19]

In sum, respondent's assertion before the Commission that short-term representations were never made is contradicted by the record. The alternative assertion, that respondent did not know of the overzealous claims of its errant sales representatives, lacks credibility and, even if true, cannot serve as a defense to Section 5 liability. Uncontradicted testimony establishes that sales representatives encountered difficulty in selling property when prospects were clearly apprised that resale would not be [18]possible for at least

[19] Although Horizon officials testified that consumers were always apprised of the long-term nature of the asset, the ALJ did not find Horizon's witnesses credible on this point. (I.D.p. 273) We uphold his findings with respect to this issue and also affirm his general conclusions concerning the credibility of Horizon's witnesses, except where specifically noted in our modifications of the ALJ's findings of fact (*see* this opinion and Appendix A). (I.D.pp. 272–75)

eighteen to twenty years. (I.D. pp. 59, 63, 259; *see also,* CX 951i; Miller, Tr. 2356) It is difficult to believe that Horizon management did not searchingly inquire as to the marketability of its product and the manner in which its agents represented that product. As the ALJ points out, the law of agency demands no less. (I.D.p. 290) However, even if Horizon management chose to remain ignorant of the time frame representations made by its sales force, its ignorance constitutes a failure to exercise reasonable diligence in controlling sales practices in the field, and does not serve as a defense to Section 5 liability. We find that Horizon knew, or with the exercise of reasonable diligence should have known, that representations regarding the short-term nature of its product were regularly made by its agents. The Commission also finds that respondent knew, or with the exercise of reasonable diligence should have known, that a resale market for its properties would not develop prior to the year 2000, and that consequently Horizon land should not be marketed as a short-term investment.[20] Therefore, we conclude that Horizon allowed its agents to make false and misleading statements in marketing its properties.[21]

Horizon rejects the ALJ's characterization that the above evidence constitutes representations of an "excellent" investment. Instead, Horizon maintains that it represented its properties as "a desirable expenditure of discretionary funds." (RPF 137, p. 80; *see, also,* RPF 135–136) Alan Nevin, a realty investment expert, testified on behalf of Horizon that an "excellent" investment must have "a high guaranteed tax shelter, cash flow, substantial equity built up, tremendous tax shelter, guaranteed high level of appreciation probably 15 to 20 percent or more and be risk-free." (Nevin, Tr. 15,955; *see* I.D.p. 263) Horizon argues that because it made adequate disclosures of uncertainty as to time of resale and appreciation, its property was not represented as an excellent investment as that term is understood by an investment analyst. (RPF 134–137; R. Rep 12–17) This argument must be rejected because it relies upon a fundamental misunderstanding of Section 5 principles. In this regard, the Commission is in complete agreement with Judge Barnes' statement of the law: **[19]**

It is the impression conveyed or the implication created *in the mind of the ordinary purchaser* that is the concern in this proceeding, not whether the representations fit

[20] *See* individual property analyses, *infra* at pages 26–48.

[21] Horizon relies on testimony of "satisfied" customers to prove that it did not misrepresent its properties. However, as the law judge points out, respondent cannot escape liability for a significant number of misrepresentations merely because in other instances misrepresentations may not have been made. (I.D. pp. 272–73) Nor is it a defense to a charge of deception under Section 5 that some customers were satisfied with the product, despite false and misleading representations having been made. (I.D.p. 272, n. 21)

precisely into the mold of an excellent investment created by a sophisticated realty investment expert. The word "excellent" has a dictionary meaning of "superior, very good of its kind; [e]minently good; first-class." *Webster's Seventh New Collegiate Dictionary,* 1969. Horizon, in almost every conceivable way short of an absolute guarantee, represented its land to be an excellent investment, better than savings accounts, stocks and bonds, and insurance, and risk free . . . . [I]t is concluded that Horizon represented its land to be a superior investment, [e]minently good, first-class . . . . Beyond any doubt, Horizon created the impression that its properties were excellent investments. (I.D.p. 263) (emphasis added)

The Commission has examined the evidence of record from the posture of a typical consumer who bought Horizon land. We have viewed both Horizon's representations and disclosures in the context of how and when they were made. We find that Horizon made unqualified representations concerning the appreciation of land as an investment, misrepresented its development obligations and failed to inform consumers of hidden risks when they existed; and we conclude that these claims and omissions of material facts violated Section 5. We further find that the net impression created by the representations detailed in I.D. 1–137 is that Horizon land is an excellent, financially risk-free, short-term investment. To determine if these general investment claims also violate Section 5, we turn now to an analysis of whether the evidence concerning Horizon's various properties contradicts those claims.

II. INVESTMENT VALUE OF HORIZON'S PROPERTIES

The Commission bases its findings regarding the truth of Horizon's representations concerning the investment value of its properties on the testimony of expert witnesses at trial who identified several factors that must be considered in evaluating the quality of land investments. The most important factors cited were: (1) the likelihood that the properties will absorb future population growth and development; (2) the future costs of any development expenses to be incurred by the purchaser; (3) whether the purchase price of the land was equal to the market value of the land; (4) special risk factors associated with the property; and (5) the carrying costs of the property until liquidation. (I.D.pp. 276–77; *see, generally,* I.D. 101–117) **[20]**

Of these five criteria, expert witnesses testified that an economic analysis of the investment characteristic called "absorption" (factor (1) above) was the most crucial test of a property's investment value, and consequently the Commission's determination of the truth of Horizon's representations centers on that criterion.

The record reveals significant variations among the six Horizon

properties with respect to absorption and also development costs (factor (2) above). Therefore, those factors will be separately considered in the discussions of each property which follow.

However, the record indicates with respect to factor (3) above, that lots in each of Horizon's six properties are susceptible to the same analysis with respect to market value. Rather than review that evidence six times, the Commission's finding concerning market value for all properties will precede the property-by-property analyses.

Similarly, the evidence concerning factor (4)—special risk factors, such as fractionalization of ownership and adequacy of development plans—applies equally to all six properties and will be considered as a whole before proceeding to the property-by-property analyses.

With respect to factor (5), carrying costs,[22] complaint counsel offered some limited evidence to show that such costs existed, however this evidence is insufficient to establish that they posed material costs to investors in this case. Therefore, the Commission will not consider them in determining the truth of Horizon's investment claims.

A. Market Value and Special Risk Factors

An important criterion used by expert witnesses to evaluate the investment quality of Horizon land was whether the purchase price established by Horizon was equal to the land's market value. According to expert witnesses, the market value of land is the price arrived at through arm's length bargaining; it is essential in determining market value that both parties be well informed, that they are each motivated by their best self-interest, that they have a reasonable time to complete the transaction, and that the purchase price be unaffected by external factors. Respondent defines market value as "the highest price in terms of money which a property will bring in a competitive and open [21]market, under all conditions *requisite to a fair sale,* the buyer and seller each acting prudently [and] *knowledgeably,* and assuming the price is not affected by any undue stimulus." (Lomax, Tr. 15271, emphasis added; RAB 19).

Based on testimony of consumers and local real estate agents, the ALJ found that a resale market for undeveloped Horizon land was virtually nonexistent, now and in the foreseeable future,[23] and

[22] Carrying costs include such expenditures as property taxes, improvement association charges and interest paid on the purchase price.

[23] Extensive record evidence reveals that, outside of the development core, at the time of trial little development existed on any property (I.D. 8–22; I.D.pp. 277–81), and virtually no resale market existed for lots within any property. The evidence concerning the availability of resale markets shows that (1) real estate brokers were unable to resell the land and therefore refused even to accept listings on Horizon's lots; (2) several individuals

(Continued)

concluded that that is strong evidence that undeveloped Horizon land has no market value. (I.D.pp. 281–82) He also found that even if the price Horizon originally paid to purchase its land represented market value, the tremendous disparity between Horizon's purchase cost and selling price is evidence that Horizon's selling price is far in excess of market value. (I.D.pp. 281–84)

Horizon urges reversal of this finding on a number of grounds. (*See* RAB 17–22; R. Rep 17–24) Horizon argues first that lack of a resale market evidences only present illiquidity, and does not prove that the land has no investment value. (RAB 21) The Commission must reject this argument for several reasons. By 1978, when the record closed in this proceeding, consumers who purchased lots in 1969 on the basis of representations that their investment would mature in seven to ten years had already been disappointed. Further, Horizon's argument fails to distinguish between short and long-term investment value. Lack of present liquidity is probative of whether a resale market may be expected to develop over the short-term. Also, other available evidence, particularly the absorption studies which will be discussed below, establishes that the present illiquidity of Horizon land will extend over the short-term. **[22]**

Horizon next argues that its expert witnesses have concluded that the purchase price consumers paid Horizon for the land represents its market value. (RAB 19) Horizon concedes that its experts based their testimony about market value "primarily upon a showing that the purchasers of the land were knowledgeable." (*Id.*) However, since the Commission finds in the property-by-property analyses below that Horizon's representatives significantly misrepresented the nature of the investment consumers were buying, the Commission cannot accept Horizon's conclusion that those consumers were "knowledgeable" in their investment decisions. (*See* C. Ans 23)

Horizon further contends that no conclusion regarding low market value may be properly drawn from the disparity between Horizon's acquisition cost and its selling price, and that such consideration by the ALJ was arbitrary. (RAB 21) Horizon reasons that it is illogical to compare the price it paid in 1959 with the price it asked in 1972; that the price Horizon paid per acre was much lower because it

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made unsuccessful attempts to sell their lots; (3) a substantial number of purchasers eventually gave up efforts to sell their lots in frustration and defaulted on their contracts; (4) a substantial number of Horizon lots were auctioned off at tax sales but even those auctions sometimes failed to attract bids for Horizon lots; (5) expert witnesses could not discover a resale market for Horizon lots; and (6) some lots were ultimately assigned a minimum appraisal value for tax purposes. We further agree with the ALJ that Horizon officials were on notice of the lack of a resale market because they knew about the events described immediately above. (I.D. 123–128; I.D.p. 281)

bought the land in bulk; and that Horizon's master plan for development increases the land's value.

The Commission agrees with respondent that the bulk acreage it acquired in 1959 was a vastly different asset from the fractionalized property Horizon sold to consumers in 1972. However, this fact leads us to a different conclusion than the one Horizon posits. Horizon's division of its properties into small lots, which it sold principally to individual consumers rather than to large developers, frustrated a coordinated development effort. Thus, short-term development of Horizon land was unlikely even if Horizon properties were able to attract the population levels widely predicted by respondent. Because development of Horizon properties over the short-term was unlikely, no resale market for that land developed. Accordingly, consumers were left holding land that today lacks any short-term market value. Therefore, although the ALJ should have recognized the difference in the nature of the asset Horizon bought and the one it sold, the Commission affirms the ALJ's finding that undeveloped Horizon lots have no short-term investment value because no market exists to buy and sell those lots.

In sum, we conclude that respondent's definition of market value is fatally flawed for the purposes of this case by its own requirements regarding the knowledgeability of the buyer and the fairness of the sales transaction. Considering all of the evidence, we conclude that the purchase price established by Horizon bore little relation to the land's market value principally because of our agreement with the ALJ that there is virtually no resale market for Horizon land. **[23]**

Another element of investment value identified by expert witnesses at trial is the existence of special risk factors, such as physical characteristics of the land that determine whether it can be developed, the availability of an adequate water supply, the expertise and capability of the people involved in managing the investment, the adequacy of development plans and whether the ownership of the property is too fractionalized to enable a realistic achievement of development plans. The two most pertinent special risk factors which affect equally the majority of Horizon lots are fractionalization of ownership and lack of achievable development plans. As discussed above, the fractionalization of the ownership of Horizon lots has frustrated any meaningful development to date because individual lot owners, who in many instances live long distances from their property, cannot organize collective development efforts effectively. Further, the development plans promised by Horizon have not materialized and therefore cannot supplement or replace owner efforts. These problems have substantially contrib-

uted to the failure of the land as an excellent, risk-free investment that will mature over the short-term, which is how the land was marketed.

B. Absorption and Costs of Development

"Absorption" was defined at trial as the analysis of when a property will be placed into a specific "end use." (*See, e.g.,* Stevenson, Tr. 6589) "End use" is the purpose for which a purchaser ultimately buys property from an investor; it is generally a productive retail use,[24] but can also embrace non-productive financial transactions, such as holding valueless land for purposes of taking a tax loss deduction. (I.D. 105) End use is crucial to an informed investment decision because if the represented end use of a specific property is not in fact a reasonable end use for that property, that investment cannot correctly be characterized as "excellent." By selling its properties for ultimate residential and commercial end uses within a short-term, Horizon impliedly represented that those were reasonable end uses of its properties. Consequently, the Commission must determine whether it was reasonable for Horizon **[24]**to represent that its lots *would* be used for residential and commercial purposes over a short-term time frame of less than twenty years, and in many cases less than ten years.

One method of determining whether the represented end use is reasonable is to compare the represented end use with expert testimony concerning a property's "highest" or "best" end use. "Highest" end use is determined by analyzing the use of the property that at the time of final disposition will yield the greatest return on the investment dollar.[25] For example, one expert witness testified that the best end use of Whispering Ranch lots would be for cattle grazing. (Mangin, Tr. 3424)

The rate at which a property will be placed into its end use is the subject of an absorption study, which predicts the resolution of a supply and demand clash for property in a given study area.[26] At

[24] "End Use" was discussed by complaint counsel's expert witness, Professor Stevenson. Professor Stevenson testified:

> [S]ound investment value must ultimately be related to use, which is basically a retail end user use. I think this is true in the stock market where you see many of the promotions that had no fundamental end market for their product got burned. This has been true in real estate. You can ride bubbles, you can ride dreams, but fundamentally it is end use that creates value (Stevenson, Tr. 6587).

[25] "Highest end use" was discussed by complaint counsel's expert witness, Jack Mann. Mr. Mann testified:

> Highest and best use is one of the basic principles. It is defined as that legal reasonable approximate utilization that results in the greatest net return to the land, legal in the sense that it must not be illegal, reasonable in the sense it must be susceptible of achievement and approximate is another word for "near," which simply means it is a use which must occur within the reasonably near future. (Mann, Tr. 7583).

[26] Respondent did not offer into evidence any type of absorption study for any of its properties prepared prior to the time it began to market land as an "excellent, risk-free investment." (I.D. 33) We can only infer, therefore, that no such studies existed. To the extent it made representations relevant to the absorption of its properties

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least four distinct types of absorption studies were [25]proffered at trial.[27] The first type of absorption study is called a "trend curve" or "growth curve." (*See, e.g.,* Stevens, Tr. 14731–34) It involves plotting a curve on a graph that represents the historical growth rate in a given study area, and extending the curve to predict future growth. The second type of absorption study is a statistical model that focuses on economic and demographic factors. (*See, e.g.,* Stevens, Tr. 14749–54, 14892) Among the factors indexed in the studies before us are population density changes derived from census data, income data, tax rates, labor costs, land costs, percentages of ethnic populations, and desirability of climate.

The trend curve and statistical absorption studies described above were used by expert witnesses and city planners to predict future absorption in large geographic areas, such as regions and major cities. From this data, a third type of absorption study was prepared to predict specifically the absorption of population and industry by Horizon's properties. Thus, the third type of absorption study is another statistical model. By computing, in a mathematical function, economic and demographic factors that appear to influence the population distribution and growth among different sections of specific cities, analysts are able to project future growth trends in suburban areas close to those cities. Using this approach, witnesses testified to the percent of a study area's future population that a Horizon property may be expected to garner. (*See, e.g.,* Stevens, Tr. 14695–96)

A fourth type of absorption study was used for Waterwood. Because Waterwood was designed primarily as a recreational community and not as a residential community, an economic study was prepared to aid in predicting the rate of "consumption" of units

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without establishing "prior substantiation" for those representations, it may have violated Section 5. (*See National Dynamics Corp.,* 82 F.T.C. 488 (1973), *aff'd in part and remanded in part,* 492 F.2 1333 (2d Cir. 1974), *cert. denied,* 419 U.S. 993 (1974), *modified on remand* 85 F.T.C. 391 (1974), *reconsideration,* 85 F.T.C. 1052 (1975); *Pfizer Inc.,* 81 F.T.C. 23 (1972)) However, because the complaint did not allege a lack of substantiation, and because our review of the record indicates that this question was not tried by the express or implied consent of the parties (*see* Commission *Rules of Practice,* 16 C.F.R. 3.15(a)(2)), we decline to find an independent violation of Section 5 on this ground.

Expert testimony at trial clearly demonstrates that such studies are a prerequisite to the development of a truthful marketing program. (I.D. 133) In future cases, the Commission will consider carefully the adequacy of the substantiation possessed by a land sales company at the time representations are made in evaluating whether Section 5 violations have occurred.

[27] Horizon has argued that complaint counsel produced absorption studies for only one property, Horizon City. (RAB at 17–18) While Horizon is correct that Horizon City is the only property for which complaint counsel contracted with a private analyst to prepare an absorption study, complaint counsel nevertheless did produce existing studies prepared by state and local planning offices that yield absorption data. If a specific absorption study—the analysis of when a property is expected to be placed into a specific end use—is deemed credible, it makes little difference whether the study was prepared by a city's planning department or by a private economist. Indeed, Horizon's own expert witnesses treat city planning projections as absorption studies. (*See, e.g.,* Stevens, Tr. 14731–2)

in Waterwood, rather than the rate of growth of Waterwood's permanent population. (*See* Stevens, Tr. 14696) [**26**]

The Commission below analyzes the various absorption studies in the record on a property-by-property basis. In balancing the investment value of each property against Horizon's investment claims, particular attention is directed to two central questions: (1) based on absorption analysis, will respondent's properties be placed into residential and commercial end uses in a short-term period of less than twenty years; and (2) based on the time until absorption, can residential and commercial end uses be considered reasonable end uses of respondent's properties.

The second factor identified by expert witnesses as important to evaluating land investment decisions concerned the future costs of any development expenses to be incurred by the investor. Consideration of this factor is particularly appropriate in this case, because the parties have debated whether consumers understood both that Horizon was not obligated to develop its properties and that development costs of a consumer's lot could be many times the purchase price of that lot. The Commission therefore also reviews the evidence concerning this issue in the property-by-property analyses below.

Horizon City

As of May 31, 1976, Horizon City contained 135.94 square miles or 87,000 acres, (some 60,000 of which had been sold) and was located 5–19 miles southeast of the city limits of the City of El Paso, Texas. El Paso contained 160.71 square miles and had a population of approximately 400,000 when the record closed. (I.D. 17; CX 874 p. 48)

Horizon City lots were platted and sold for residential and commercial end uses. Whether these were reasonable "end uses" over the short-term time frame represented is a function of the interaction between the supply of land in the El Paso metropolitan area and the demand for that land. In this regard, both sides at trial produced absorption studies that describe the outcome of El Paso's supply and demand duel, and which inform us whether, where, and when people are expected to move into the El Paso area. Despite the attempt at trial to prove whose projected population figures were more accurate, the Commission affirms the ALJ's finding that the parties differed only insignificantly with regard to El Paso's expected future population. (I.D.p. 279)

In preparation for trial the parties prepared thirty year absorption studies of both the El Paso Standard Metropolitan Study Area (El

Paso SMSA) and Horizon City, for the years 1975–2005. At trial, the two sides each called witnesses who were experts in the fields of economics, demographics, and real estate planning. Expert witnesses called by complaint counsel projected a population of the El Paso SMSA for the year [27]2005 of approximately 742,450.[28] (I.D.p. 279) Expert witnesses called by Horizon projected a medium population for the same year of approximately 809,000 and a low projection of 745,000.[29] (*Id.*) [28]The difference between complaint counsel's figure and respondent's low figure is less than 5,000, a difference that we find is meaningless in the context of a projection thirty years into the future.[30]

Because the parties substantially agree on the likely population of the El Paso SMSA in 2005, the real controversy centers around whether Horizon City can be expected to absorb enough of that population in order to establish an active resale market. Horizon contends that, due to high growth and a locked-in corridor of development, sufficient resale markets will develop. Respondent's expert witnesses Dr. Stevens and Mr. Lomax both project populations of approximately 75,000 for Horizon City in 2005. (I.D. 111, 113) Based on these projections, respondent expects absorption of land in Horizon City to be 19,000 acres, or 21.8 per cent of the land, by the year 2005. (I.D. p. 279) By contrast, complaint counsel's experts

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[28] Among the evidence most heavily relied upon by complaint counsel witnesses was a 1970–74 demographic study prepared by the Department of Planning, Research and Development, City of El Paso (Planning Department), which assessed current and future transportation needs of the El Paso SMSA through the year 2000. Complaint counsel's expert, Joseph Lusteck, used the Planning Department's study to project the 2005 population of 742,450.

Mr. Lusteck is a real estate planning consultant and President of the Real Estate Division of Wortman and Mann, Inc., a real estate and financial services company located in Jackson, Mississippi. Prior to his employment by this firm, he was with the Pima County [Tucson, Arizona] Planning Department and then with the Jackson [Mississippi] Planning Board. (I.D. 103)

The record also indicates that the Planning Department's 1970–74 study predicted a year 2000 population for the El Paso SMSA of 680,750. A Planning Department study conducted in 1976 revised the projected figure to 685,000, a difference of 4,250. (I.D.p. 279; *compare* CX 876 with CX 797)

[29] Horizon's expert witnesses were Dr. Benjamin Stevens and D.A. Lomax. Dr. Stevens prepared an absorption study projecting populations of 863,700, 809,000, and 745,000 as high, medium, and low populations, respectively, for the El Paso SMSA in 2005. D.A. Lomax accepted the Planning Department's figures as accurate and produced a population projection that was in accord with Dr. Stevens. (I.D.p. 279)

Dr. Stevens is the President, Director and senior research associate of the Regional Science Institute, a non-profit research corporation doing work in regional analysis, regional economics, industrial location, land development and urban planning. The field of regional science encompasses the fields of economics, demographics and planning. Dr. Stevens received a Master's Degree in city planning and a Ph.D. in regional planning and economics from the Massachusetts Institute of Technology. He has authored or co-authored 60 articles, reports and discussion papers on various aspects of regional science. For the last twenty years, he has been co-editor of the *Journal of Regional Science*, the most highly regarded professional publication in its field. (I.D. 110)

Mr. Lomax is a professional real estate appraiser and consultant, who specializes in land in Texas, New Mexico and Arizona. He had been an appraiser for 25 years at the time of his testimony and is a member of the American Institute of Real Estate Appraisers, a senior Real Estate Appraiser and an Accredited Rural Appraiser. At the time of trial, he was national vice president of the Society of Real Estate Appraisers and had served for six years on the Society's Board of Governors. He is the author of the *Rural Appraisal Handbook* for the New Mexico State Tax Commission and has written several articles for professional Magazines on appraising. (I.D. 112)

[30] The expert witnesses agreed that the more distant the projection the greater the chance of statistical error. (*See, e.g.*, Mann, Tr. 7700, 7738)

predict a population in 2005 sufficient only to absorb 2,859 acres, or 3.3 per cent of the land in Horizon City. (I.D.p. 279) Horizon has argued that "[a] city is never fully absorbed; few cities even exceed 70–75% absorption." (RAB 18) While it may be true that few cities ever exceed 75 per cent absorption, in the instant case, respondent's best estimate is that by the year 2005 Horizon City will remain 78.2 percent *un*absorbed. Complaint counsel estimate that Horizon City will be 96.7 per cent *un*absorbed.

Although respondent has disputed that significant numbers of short-term representations were made, respondent has never seriously contended in this proceeding that Horizon City could be developed within a short-term of less than twenty years. As stated, we find that a significant number of short-term representations were made. Accordingly, we hold that representations of **[29]**excellent, financially risk-free investments regarding unimproved lots in Horizon City, which were due to mature within a short-term, were false and misleading and were deceptive within the meaning of Section 5.[31] **[30]**

Although we have found that respondent's best estimates of potential Horizon City absorption are insufficient to stimulate a resale market over the time frame represented by Horizon, we further find that even those projection are overly optimistic and predicated on unlikely assumptions. Mr. Lomax's population projection of 75,000 for Horizon City was based on the assumption that,

> all of the lands . . . immediately contiguous to the basic development area of Horizon City would be absorbed into the community, [the city of El Paso,] and would be a part of the community. *This is assuming that the community were to grow in a very straight pattern,* taking in every section of land as it moves from where it is now out to that point in time. (Lomax, Tr. 15217) (Emphasis added)

The assumption of a "very straight" growth pattern has its genesis in respondent's belief that growth in the El Paso SMSA is locked-in to a geographic corridor leading from El Paso's city boundaries to Horizon City's front door. To rely on such an assumption, respondent

[31] Further confirmation of our conclusion exists in the fact that resale of Horizon City lots has been insignificant through the time of trial. (*See, generally,* I.D. 125) Illustrative of the situation is the experience of the El Paso Board of Realtors, which operates a Realtors Listing Service (RLS), and which increased its membership from 166 in 1970 to 354 in 1977. The ALJ found that of "about 1400 inquiries to the RLS there were approximately 266 listings and 14 sales of Horizon City property during the period from 1970 to 1976 (Tr. 2376, 2388–89.)." (I.D.p. 238) Consumer testimony also indicates that little or no resale market existed. (I.D.p. 240)

Respondent additionally contends that Horizon City is in fact a desirable long-term investment, which could mature within twenty to thirty years. We do not have to reach the merits of this contention since we find that short-term representations were made. However, we note in passing that even if we assume that Horizon made long-term representations and that respondent's absorption estimates are more accurate than complaint counsel's, we doubt that an absorption of only 21.8 per cent of Horizon City's lots will result in the stimulation of a sufficient resale market to enable the owners of Horizon land to engage in competitive dispositions of their investment over a twenty to thirty year period.

must ignore both the past directions of growth surrounding El Paso, and the official future development plans of El Paso's Planning Department. Jonathan Cunningham, the Director of the Planning Department, testified at trial regarding issues concerning the direction of El Paso's growth. The Planning Department has prepared annual demographic studies of the El Paso SMSA since 1960 and has prepared several studies encompassing a number of years. Major studies were undertaken in 1963, 1969, and 1976 in conjunction with El Paso County, the Texas Highway Department, and the Bureau of Public Roads (now the Federal Highway Administration). (Cunningham, Tr. 2514) These studies were developed to assess the current and future transportation needs of the El Paso SMSA. [31]

Mr. Cunningham's testimony is summarized by the ALJ at I.D. 76. He testified that since his incumbency began in 1958, El Paso has grown, and is expected to continue to grow, in more than one direction. Although natural and artificial barriers constrain growth on three sides of El Paso, these barriers are not a solid curtain. The Planning Department expects significant growth to continue on either side of the Franklin Mountains, to the north and to the west, as well as in the "Lower Valley" area to the southeast. The Lower Valley contains vast acreage of fertile to arid land between the Rio Grande River and Interstate Highway 10, south of Horizon City. Limited growth is also expected in the vast acreage between Ft. Bliss and Horizon City, north of Horizon City.

Mr. Cunningham testified that El Paso has vigorously pursued a policy of annexing developing communities that border the City. He stated that the City was currently engaged in constructing a major "North-South Freeway," which will lie between the Franklin Mountains and Ft. Bliss. Community development has already begun along this highway as the City annexes land and extends utilities and City services. One of complaint counsel's experts, Joseph Lusteck, testified that in addition to the vast tracts of land surrounding El Paso, as of the date of trial, sufficient vacant land existed within the city boundaries to accommodate *all* of El Paso's projected growth through the year 2005. (I.D. 104)[32] Moreover, the land within the City would have the advantage of ready access to city services and city utilities. Considering the vast amount of unimproved land both within and without the corporate city, Mr. Lusteck concluded that the principal flaw in the Horizon City property was

[32] For a description of Mr. Lusteck's qualifications, *see, supra*, p. 27 at note [28].

the oversupply of land in relation to the relatively small projected demand for that land. (*Id.*)

The oversupply problem is magnified by the difficulty of extending utilities to Horizon City. Respondent divided Horizon City into small lots, which it sold principally to individual consumers rather than to large developers. Without the sincere effort of a developer who has the financial capacity to extend utilities to Horizon City, the fractionalization of land ownership in Horizon City results in an inadequate infrastructure which is incapable of **[32]**establishing utilities. (I.D.p. 284) The cost of development is extremely high, and few, if any, individual consumers could be expected to have the financial capacity to extend utilities to their own lots.[33] **[33]**

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[33] Complaint counsel has compiled the following data from Horizon's federal property reports. (CPF 4.219, 4.220)

As of May, 1975, the costs of providing utility services to the various areas of Horizon City could be as high as the following amounts:

Service (and Comments)	Amount
Water (drilling individual wells not permitted)	$200,000 (CX 35p–q, 36o–p) $2.00 per foot
Gas line beyond 150 feet	$180,000 (CX 35q–r, 36p–q
alternative is LP bottled gas with storage tank	$200
Telephone	$135,000 (CX 35r, 36q)
Sewage – central system	$1,000,000
septic tank	$450 (CX 36q–r, 35r–s)

The estimated cost of installing an electric line to the Horizon City lots listed below, which are nine of the "typical" lots used in Mr. Mann's appraisals, (CX 892g–x), are as follows:

	Lot and Location	Electric Line Cost
(1) Lot 1 –	Mountain Shadow Estates Unit 54, Block 389	$23,729
(2) Lot 2 –	Horizon City Estates, Unit 19, Block 19	38,797
(3) Lot 3 –	Horizon City Unit 44, Block 318	3,472
(4) Lot 4 –	Mountain Shadow Estates Unit 30, Block 232	55,937
(5) Lot 5 –	Sunland Estates Unit 19, Block 69	7,452
(6) Lot 6 –	Horizon City Unit 82, Block 687	13,591
(7) Lot 7 –	Horizon City Estates	47,305
(8) Lot 8 –	El Paso East	1,546
(9) Lot 9 –	Horizon City Estates Unit 15, Block 2	23,594

(CPF 4.219, 4.220)

When Horizon began to market its land in the 1960's, it represented to consumers that it or some other developer would develop the property over the short-term. However, according to complaint counsel's proposed findings of fact, when the record in this proceeding closed in 1978, Horizon City had been developed to the following extent:

> The Horizon City property consists of about 87,000 acres. (Lusteck, Tr. 7039). That acreage includes [an] existing development "core" with a total size of 6,400 acres (CX 1563b). As of June, 1978, 18 years after Horizon began selling lots in this property (RX 1538a–h), buildings had been constructed on only about 600 acres in that existing core (Steele, Tr. 14019–20). There were about 700 to 800 dwellings in Horizon City as of June, 1978 (Steele, Tr. 14022). Only two other homes were located outside that core in the rest of the property (Steele, Tr. 14022). No homes had been built as of that time in the 4,000 acre core area surrounding the lake (Steele, Tr. 14022; RX 1536b). Various other holdings by Horizon total another 1,500 acres. (RX 1536b) Thus, the total area within the property on which building has occurred after more than 18 years is about 600 acres out of 87,000 acres. That amounts to less than 7/10ths of 1% of the land in that property. (CPF 4.215, p. 140)

We find that the preponderance of the record evidence establishes that growth in the El Paso SMSA is not significantly "locked-in" toward Horizon City. The record also indicates that due to a massive oversupply of land surrounding El Paso, coupled with the availability of city services and utilities to communities which develop within the City, little if any land in Horizon City can be expected to develop in the foreseeable future beyond the small core area where respondent has committed the necessary funds for development. Accordingly, we conclude that Horizon violated Section 5 when, through false and misleading representations and material omissions of fact, it marketed Horizon City lots as an excellent, financially risk-free, short-term investment. **[34]**

Rio Communities

As of May 31, 1976, Rio Communities contained 249,000 acres, or 389.06 square miles, and was located 3–18 miles east of the town of Belen, New Mexico. Some 159,000 acres had been sold. (I.D. 11) Rio's northern edge is 35 miles south of Albuquerque, New Mexico. (*Id.*) Horizon literature points out that its Rio property "blankets a land area larger than the combined cities of San Diego, Las Vegas and Philadelphia." (CX 155c) Horizon began purchasing land for Rio Communities in the 1960's; in mid-1978 there were approximately 700 homes on the property with an estimated population of between 2,500 and 3,000. (I.D. 13) The population of Belen, in 1976, was approximately 5,000. (I.D. 11)

Whether Horizon's representations concerning Rio Communities were true depends upon the reasonableness of the represented end use of Rio lots in the context of the represented time until absorption. At trial, complaint counsel called economic and demographic experts to testify, as well as the Director of the City of Albuquerque Planning Department (Planning Department) and the Director of the Middle Rio Grande Counsel of Governments (COG). COG is an association of local governments that was established to coordinate planning for the entire Albuquerque area. (I.D. 74)[34] Complaint counsel also produced absorption studies prepared by the Planning Department and by COG. For example, Exhibit CX 828, entitled "Land Use Plan-1985-Albuquerque, New Mexico" (Land Use Plan), is a 1964 Planning Department economic and growth analysis, with projections through 1985. This study has been on the public record during the entire time in which Horizon has made representations relevant to the absorption or marketability of its Rio lots. The "Land Use Plan" concludes:

> Albuquerque has an abundance of vacant land available for urban development. Even the most optimistic growth projections would not utilize this land within the current century. (CX 827z–11; *see also*, Carruthers, Tr. 3036)

Absorption studies conducted by COG after 1964 downwardly revise the Planning Department's population projections. (I.D. pp. 118, 278 n.24) COG further concludes that the most efficient planning strategy in the Albuquerque area is for development to occur in vacant land in and around existing cities, so that **[35]** utilities and city services can be made readily available. (*See, e.g.*, CX 837 pp. 23–27) Given this conclusion, we can infer that COG's planning efforts are and will be geared toward developing land both within Albuquerque's city limits and in its immediate suburbs. Thus, local government entities will be working at cross purposes with any effort to develop Rio Communities (some 35 miles south of Albuquerque) over the short-term.

Complaint counsel's expert witness, Professor Howard Stevenson, supports this conclusion.[35] Professor Stevenson did not prepare an absorption analysis of his own; his conclusions rested on an analysis

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[34] It is worth noting that neither Rio Communities nor Paradise Hills are represented in the COG and therefore are not active participants in that group's development planning. (Id.)

[35] Dr. Howard Stevenson is an associate professor at the Harvard University School of Business Administration. He holds doctorate and master's degrees from the Harvard Business School. His doctorate focused on business policy and long-range planning, and his master's, which he received with high distinction, involved specialization in investment finance. Dr. Stevenson is a trustee of a successful real estate investment trust, a director of a company which invests long-term pension accounts in the United States realty market, a director of a company whose activities include building and development, and a trustee of a non-profit charitable organization whose primary purpose is acquisition and development of raw land which is deemed to be of a critical conservation interest. (I.D. 101)

of studies already published. The Initial Decision incorporates Professor Stevenson's conclusions at page 200:

> The total of lots available in [Rio] sites exceeds the full needs of the community of Albuquerque under the most optimistic projections through—and I have to think back, given what I just included—well beyond the end of the century and depending on which projections you read, perhaps well into the 22nd century (Stevenson, Tr. 6676).

Since at least 1972, COG reports have consistently predicted that the greatest share of Albuquerque's future growth, through 1995, would occur in the northeast sector. (CX 836 p. 11, 828g; Pierce, Tr. 3117) Population projections of respondent's expert witnesses were basically in accord with those of COG, however respondent differed with respect to the direction of growth.[36] **[36]**

Horizon's expert witness, Dr. Benjamin Stevens, testified that Albuquerque's population growth will allow Rio Communities to develop as a satellite city.[37] Dr. Stevens analyzed industrial location and employment in Rio Communities, predicted the number of commuters between Rio and Albuquerque, predicted the migration of retired couples to Rio, predicted the secondary employment generated by the projected population of Rio (Stevens, Tr. 14850), and concluded that the likely population of Rio Communities in the year 2005 would be 60,000 but could be as low as 30,000 or as high as 90,000. (Stevens, Tr. 14867) Even if respondent's projections are accurate, the Commission finds that the absorption of only 60,000 people (an event not predicted to occur until beyond the close of this century) in a property that contains 690 square miles (six times the size of the District of Columbia (I.D.p. 277)) will not result in the stimulation of a resale market of sufficient size to enable the owners of Horizon land to engage in competitive dispositions of their investment within the short-term.[38]

Evidence supporting respondent's "locked-in" claim is similarly unconvincing. At best, the evidence produced by Horizon supports only the conclusion that growth would be locked-in over the long-term. Relying on testimony of its own expert witness, Horizon has stated: ". . . *by the end of the century* the major portion of Albuquerque's growth would be channeled in a southern direction toward Rio Communities (Nevin, Tr. 15874–75)." (emphasis added,

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[36] COG projected a population in the Albuquerque area by the mid-1980's of 800,000 people (Pierce, Tr. 3112–15); the city itself projected a population of 825,000 people by the year 1985 (Carruthers, Tr. 3035). Horizon's expert witness gave a somewhat more conservative projection of 700,000 to 750,000 (Lomax, Tr. 15159).

[37] For a description of Dr. Stevens' qualifications, *See, supra*, p. 27, note [29].

[38] Detailed findings concerning the lack of a resale market for undeveloped Rio lots, at the time of trial, are found at I.D. 124. These findings, which we uphold, conclude that there was no resale market for undeveloped lots in Rio Communities as of 1978.

RPF 103) At no time on appeal has Horizon pointed to evidence that would indicate a rapid locked-in growth pattern over the short-term in which its sales force represented development would occur. It is certain that growth is not significantly locked-in for the seven to ten year time period generally represented, and unlikely that growth will be significantly locked-in at any time during this century. Accordingly, we affirm the ALJ's conclusion that representations of locked-in growth were false.

Respondent further contends that absorption of Albuquerque will not necessarily precede absorption of Rio simply because vacant land is available within Albuquerque. The argument is bottomed on the fact that the price of a building lot in Rio may be vastly cheaper than a comparable lot in Albuquerque. (RPF p. 135 n.94) Respondent's analysis, however, fails to consider all [37]relevant information. While the cost of *purchasing* a lot for a homesite in Rio may indeed be relatively inexpensive, the cost of *developing* a Rio lot outside of the development core is prohibitive to the ordinary consumer.[39] Horizon has not contracted with any other development company to begin improvement in a significant number of Horizon lots, and the fractionalization of ownership in Rio has prevented the development of an infrastructure capable of coordinating development. The result is that after close to two decades of Rio land sales, only 800 dwelling units had been constructed, concentrated on 500 to 1,000 acres within the Enchanted Mesa development core, out of Rio's 249,000 acres. (Steele, Tr. 14013–16; RX 1541a–i)

In conclusion, we find that the massive oversupply of land in Rio Communities, the distance of Rio Communities from Albuquerque, the multi-directional growth of Albuquerque at present, the availability of land and utilities within Albuquerque, and the prohibitive cost of obtaining utilities in Rio Communities effectively preclude

[39] Complaint counsel compiled the following data from Horizon's federal property reports. Cost of installing utilities to lots so that those lots could be used for building are considerable. As of May, 1975, costs for utilities within the various subdivisions of Rio then being offered for sale could be as great as the following amounts:

Electricity		$142,500	(CX 11n)
Water	– extension of line	$340,000	(CX 10m)
	– drilling well	$ 12,500	(CX 10m, 11m)
Gas	– lines not available, use bottled gas instead;	$ 500	for storage facilities (CX 12n)
Telephone	– line	$165,000	(CX 12n–o)
	– radio telephone	$ 2,500	(CX 12n–0)
Sewage	– septic tank	$350,600	(CX 10–0)

In addition, it was not possible to drill for water on lots within Rio del Oro (CX 10/l–m). Septic tank use was subject to the granting of a variance because some lots were below the minimum size required, following an increase in that minimum by local authorities, apparently after the lots were planned by Gruen Associates and subdivided by respondent (*See, e.g.*, CX 10n–o, 11n–o). (CPF 4.128)

the establishment of an active resale market for Rio lots over the short-term. Therefore, representations of excellent, risk-free, short-term investments regarding Rio lots were false and misleading and deceptive under the FTC Act. **[38]**

Paradise Hills

As of May 31, 1976, Paradise Hills consisted of 13,000 acres, or 20.3 square miles, and at its closest border was located 3 miles northwest of Albuquerque, New Mexico. Some 9,000 acres had been sold. Paradise Hills was Horizon's first property to be purchased and marketed. The ALJ found that, "[s]ales of acreage parcels have been insignificant since 1970. . .". (I.D. 8)

The analysis of whether Paradise Hills lots were properly sold with the expectation of their evolution into a fully developed community within a short-term follows closely the preceding analysis of Rio Communities. Complaint counsel argue that Paradise Hills will not be developed over the short-term because of the ample availability of vacant land within Albuquerque, where utilities and municipal services already exist, and because of the fractionalization of ownership of vacant Paradise Hills land, which casts doubt on any rapid expansion of Albuquerque's utility system. This argument is supported by expert testimony, and embraced by the ALJ, who found that if Paradise Hills' past growth rate is duplicated each year in the future, it will take over a century to fully utilize all lots. (I.D. 102; I.D.pp. 277–78; *see, supra,* Rio Communities analysis.) Although Horizon represents that Paradise Hills is its model community, local realtors confirmed at trial that virtually no resale market exists for Paradise Hills lots outside of the core area.[40] **[39]**

Respondent's defense relies primarily on the testimony of two expert witnesses to prove that Paradise Hills lots are an "excellent investment".[41] These witnesses, D.A. Lomax and Alan Nevin, produced detailed investment analyses which traced the historic rise in land values in the Albuquerque area, and which conclude that Paradise Hills lots can be expected to continue to appreciate throughout this century. (I.D. 113, 117)[42] **[40]**

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[40] The resale market for undeveloped Paradise Hills land has always been insignificant. (*See, generally,* I.D. 123) For example, the Albuquerque Board of Realtors' Multiple Listing Service reports only one sale of undeveloped Paradise Hills land between 1970 and 1974. (CX 817A–N) Also, William A. Kelly, a Paradise Hills realtor and former Horizon sales representative, testified that the lack of a local resale market resulted in his having to refuse the 50–100 persons who sought bulk acreage listings of undeveloped Paradise Hills land with his firm between 1975 and 1978. (I.D. 123)

[41] Actually, Horizon's expert witnesses characterized the investment as "very good". (Lomax, Tr. 15207; Nevin, Tr. 16071)

[42] For a description of Mr. Lomax's qualifications, *see, supra,* p. 27, note [29].

D.A. Lomax's credibility was hotly disputed by the parties at trial because he was interviewed by complaint

(Continued)

The Commission finds that Horizon's defense fails to respond to the gravamen of the complaint, which charges that Horizon sold land as a rapidly appreciating asset which would be liquid within a short-term. The investment analysis of respondent's witnesses overlooks the fact that virtually no resale market exists for those lots or is likely to exist within the short-term. If a consumer purchased land in Paradise Hills in 1965, with the expectation of using investment profit to help finance retirement in 1985, the knowledge that the value of the land has theoretically risen offers little consolation to the consumer, when in 1985 no one wants to buy that land. Accordingly, while it is unclear whether Paradise Hills will attract a sufficient population to establish a resale market over the long run, the record is sufficiently clear to enable the Commission to confirm the complaint's allegations with respect to Paradise Hills. We hold that Horizon violated Section 5 when, through false and misleading representations, it marketed Paradise Hills lots as excellent, risk-free, short-term investments.

Arizona Sunsites

As of May 31, 1976, Arizona Sunsites contained approximately 47,500 acres, or 73.4 square miles, and was located in Cochise County, Arizona, between 12 and 31 miles from Wilcox, Arizona, approximately 55 miles north of Douglas, Arizona, and 100 miles southeast of Tuscon, Arizona. Some 35,000 acres had been sold. Wilcox and Douglas had approximate populations of 3,000 and 12,000, respectively. (I.D. 14) Horizon describes Sunsites as "thinly populated . . . consist[ing] primarily of undeveloped land, grazing land and farm land." (CX 67z–4, 10–k report for fiscal 1976) At the time of trial, Arizona Sunsites had a population of 1,150, with thirty-five homes located outside of the core area. (I.D. 14, 15) Sales of Arizona Sunsites land began in 1962. (RX 1542b)

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counsel prior to his engagement by Horizon as an expert witness and took positions directly contrary to his subsequent testimony for Horizon at trial. For example, on cross examination, complaint counsel elicited the following testimony from Mr. Lomax:

> Q. Do you recall also stating [at an earlier interview with complaint counsel] that if Horizon subdivisions grew as fast as Albuquerque, it would be the 22nd century before lots would be developed, all lots would be developed?
>
> A. Yes, I probably made that statement. (I.D. 114)

The ALJ therefore gave little weight to Mr. Lomax's testimony. (I.D.p. 283) We uphold the ALJ's findings concerning Mr. Lomax's credibility.

Mr. Alan Nevin is a consulting economist and senior vice president with the Sanford Goodkin Research Corporation of Del Mar, California. Sanford Goodkin provides investment advice to the real estate and lending community. Mr. Nevin's areas of expertise include land, new construction and the technicalities of feasibility. His previous employment included jobs with Ernst & Ernst, Gladstone Associates and the American Housing Guild. He holds a Master of Arts degree in statistical research from Stanford University and a Masters Degree in Business Administration from American University. (I.D. 117)

Horizon represented that investors could realize short-term profit from Sunsites lots based on end uses of commercial and residential development. The record strongly supports complaint counsel's allegation that commercial and residential lots will not develop within a short-term, and that Sunsites will not likely be developed anytime within this century. In support of this finding, the ALJ and the Commission rely heavily on expert testimony of economic development planners employed by the State of Arizona and Cochise County. [41]

At the time of trial, Frank Mangin had been Program Director for Economic Development for the Arizona Governor's Office, Planning Department since December 1975.[43] He was responsible for attracting employment-based industries to Arizona. (Mangin, Tr. 3372) Mr. Mangin testified that he has received no inquiries from industry regarding potential development in Arizona Sunsites, and further that the property "lacks the first ingredient" necessary to attract industry, "a demonstrable labor supply." (Mangin, Tr. 3401) Mr. Mangin also stated that neighboring towns could not provide jobs for residents of Arizona Sunsites. (Mangin, Tr. 3401–04) He concluded that the population was too thin in Sunsites and neighboring towns even to support a retail trade center. (Mangin, Tr. 3406)[44]

Mr. Mangin further testified that seventy-five per cent of the residents of Sunsites are retired. (Mangin, Tr. 3404) There are no schools in Sunsites, and the nearest high school is 28 miles away. (*Id.*) Moreover, Mr. Mangin testified that the economy of Arizona Sunsites won't support an adequate medical infrastructure, and that Arizona Sunsites had not a single doctor. (Mangin, Tr. [42]3398–99, 3415, 3471–2)[45] Relying on Mr. Mangin's testimony, the ALJ correctly identified a contradiction in Sunsites development: the community is dependent upon retirees for growth, but medical facilities and personnel are inadequate either to support a geriatric

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[43] Mr. Mangin's experience has also extended to similar employment on behalf of Cochise County and Douglas, Arizona. (*See* I.D. 106; Mangin, Tr. 3374–5, 3396, 3433–37) He was therefore familiar with Arizona Sunsites.

Prior to his employment in the Governor's office, Mr. Mangin was Executive Director of the Douglas (Cochise County) Arizona Chamber of Commerce and consultant to the City of Douglas Industrial Development Authority. Mr. Mangin was also employed by Arizona's Valley National Bank as vice president of Industrial Development. He was a real estate broker from 1959 until 1965. (I.D. 106)

[44] Mr. Mangin explained that major retail outlets generally require a population far in excess of Sunsites' current population or future population expectations.

> There aren't enough folks to have a 30,000 square foot Sears or 75,000 square foot K-Mart. In the case of, for instance, a major retail discount house, they usually like trade area populations of 50,000, so that's why the only major retail outlets in Cochise County are in Sierra Vista and Douglas, because Douglas and Agua Prieta combined are about 60,000 and the Sierra Vista trade area is about 50,000.

[45] Mr. Mangin testified to the difficulty of attracting doctors to rural communities. In 1972 there were 46 physicians (41 medical doctors and five doctors of osteopath) servicing a population of one physician per 1,500 people. Because of the insufficient medical market in Sunsites, the Planning Department has made little effort to attract medical personnel to the Sunsites area. Mr. Mangin stated that while some rural communities in Arizona have incentive programs to attract doctors, Sunsites does not. (Mangin, Tr. 3398–98, 3472)

community or to spark growth or development as a retiree center. (I.D. 106; I.D.p. 280)

David Altenstadter, Cochise County Planning Director since 1970, prepared an absorption study in 1975, entitled Cochise County Projective Allocation Model. (CX 860) This report, which was widely disseminated in Cochise County, projected year 2000 populations of 152,778 in Cochise County and 5,000–6,000 in Arizona Sunsites. (I.D. 109) While the relationship between a population of 5,000 and land spanning 73.4 square miles was never translated into an absorption percentage, we conclude that absorption will be insufficient to enable competitive disposition of investment property over the short-term.[46]

In addition to the vast oversupply of land at Sunsites, the cost of utility extension is prohibitive.[47] **[43]**

Respondent's sole expert witness regarding Sunsites was Sanders Solot, a Tuscon real estate appraiser.[48] Mr. Solot analyzed the investment value of Arizona Sunsites and concluded that the value of Sunsites lots would increase at a rate at least equal to the cost of living, approximately 7 per cent to 10 per cent per year between 1978 and 2005. (Solot, Tr. 15738, 15750) Mr. Solot testified that all of the land in Sunsites was developable; he did not testify as to when, where, and how development would occur. (Solot, Tr. 15645, 15706) He concluded ultimately that Arizona Sunsites lots are a sound 20–30 year *long-term* investment of discretionary funds. (Solot, Tr. 15646, 15677)

In light of the Commission's finding that Horizon marketed Sunsites as a short-term investment, respondent's best evidence—that Arizona Sunsites is a sound long-term investment of discretionary funds—amounts to a virtual concession of complaint charges that respondent deceptively represented to purchasers that their lots would be located within fully self-contained communities within a short-term. We hold that Horizon's use of false and misleading statements to market Arizona Sunsites property constitutes a violation of law under Section 5 of the FTC Act.

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[46] Detailed findings concerning the lack of a resale market for undeveloped Sunsites lots, at the time of trial, appear at I.D. 128.

[47] *See, e.g.*, Fusco, Tr. 4030 (cost of extending electric lines to property is $1.50 per foot plus $50 standby charge); Bethel, Tr. 4171 (some properties would require four mile extensions from existing electric lines); Fusco, Tr. 4031 (cost of drilling a well is $10 per foot, with an average well being 350 to 500 feet).

[48] Mr. Solot had been an appraiser for 25 years at the time of his testimony, working primarily in Arizona. He is a member of the American Institute of Real Appraisers and is a Senior Real Estate Appraiser with that organization. He is a graduate of the University of Arizona and has taught real estate appraisal courses at the University. (I.D. 115)

Whispering Ranch

As of May 31, 1976, Whispering Ranch contained approximately 19,000 acres, or 29.6 square miles, and was located in Maricopa County, Arizona, approximately 36 miles northwest of Phoenix, Arizona. (I.D. 16) With the exception of unpaved roads constructed by Horizon, Whispering Ranch has no current development, including no development core. (*Id.*) In a 1969 prospectus, Horizon describes the property's terrain as hilly range land, its soil as generally coarse granular to sandy loam in character, and its vegetation as primarily southwestern desert type, namely [44]cactus, yuccas, and mesquite.[49] Whispering Ranch was Horizon's only property that was not zoned for any specific end use.[50] However, Horizon represented that the land would become absorbed for residential and commercial purposes as Phoenix expands. (I.D. 88; *see, also,* Horizon's SEC 10–k report for fiscal 1976, CX 67c)

Frank Mangin testified as an expert witness on behalf of complaint counsel.[51] The ALJ summarized his testimony as follows:

> In Mr. Mangin's opinion Whispering Ranch is suitable only for cattle grazing (Tr. 3424). He testified that Whispering Ranch is so far removed from economic activity and utilities that no one to his knowledge has thought about Whispering Ranch as a potential residential area (Tr. 3389). It does not have any value for any commercial or industrial purpose (Tr. 3390). The location has no labor force, transportation access or utilities (Tr. 3390–93). Mr. Mangin cannot conceive of Whispering Ranch having any value within the next 30 years for residential, commercial or industrial purposes (Tr. 3396). He testified that Whispering Ranch was "removed from people, roads, utilities and, consequently, demand for the use of it" (Tr. 3424). (I.D. 106; *see, also,* I.D. p. 280) [45]

Although respondent represented that its communities would grow rapidly because they are located near growth cities such as Phoenix, Mr. Mangin does not believe there will be rapid growth on the Whispering Ranch property. He testified that Phoenix has grown in a multidirectional pattern, and that as growth moves out 360 degrees from the center of Phoenix there is an exponential increase in the available supply of inexpensive vacant desert land. Accordingly, Mr. Mangin foresees no development whatsoever at Whispering Ranch within at least the next thirty years. (Mangin, Tr. 3394–96, 3427–28, 3468) David Hamernick, a planner in Arizona's Office of Economic Planning and Development, was in accord with Mr. Mangin's assessment of the availability of land for private commercial or home use. (I.D. 108; *see, also,* Hamernick, Tr. 3677–78, 3672–

[49] *Prospectus,* Horizon Corp., February 26, 1969, CX 63z–15.

[50] A consumer's description of her Whispering Ranch purchase is contained in I.D. pp. 94–95. (Testimony of Nancy Tweedy)

[51] For a description of Mr. Mangin's qualifications, *see, supra,* p. 41, note 43.

74, 3668; *see also,* CX 843, pp. 31–32—Report of Planning Department) Due in part to this vast undeveloped acreage, and the fractionalization of land ownership in Whispering Ranch, the cost of extending utilities was prohibitive.[52]

Sanders Solot was respondent's sole expert witness concerning the investment value of Whispering Ranch.[53] He testified that the best end use of Whispering Ranch property is long-term land investment, defined as 20–30 years. (I.D. 115; Solot, Tr. 15607) The record is unclear as to whether Mr. Solot meant a 20–30 year period beginning as of the date that he testified, or as of the date the consumer's contract was signed. (I.D. 115) Mr. Solot did not have an opinion as to when Whispering Ranch would be developed for use as home sites. (I.D. 115; Solot, Tr. 15706) He predicted that Whispering Ranch property would appreciate in value at a rate at least equal to the rate of inflation. (I.D. 115) He acknowledged, however, that a possible reason no current resale market existed for Whispering Ranch lots was due to an inordinate supply of land in the area.

Since we find that Whispering Ranch property, like Horizon's other properties, was marketed as a short-term investment, Mr. Solot's testimony amounts to a virtual concession of the complaint's charges with respect to Whispering Ranch. We would also note that Mr. Solot's projection of 20–30 year investment liquidity was at loggerheads with the testimony of complaint counsel's expert witnesses. The preponderance of evidence supports complaint counsel's argument that Mr. Solot's 20–30 year projection is overly optimistic. **[46]**

In conclusion, we find that Whispering Ranch lots will not be placed into commercial or residential end uses during the short-term represented to consumers by Horizon and chances are remote that lots will be placed into commercial or residential end use until sometime in the next century. We conclude that Horizon's marketing representations were deceptive and in violation of Section 5 of the FTC Act.

Waterwood

Respondent has sold lots in Waterwood, its latest property, since 1973. (RX 1543b) As of May 31, 1976, Waterwood contained 25,000 acres, or 39 square miles, and was located 19 miles from Huntsville, Texas, which had a population of 15,000. Some 1200 acres had been

[52] *See, e.g.,* Campbell, Tr. 3296 (400 foot well would cost $4,000, exclusive of the $500 pump); Mattison, Tr. 3567 (basic cost of overhead single-phase electric line would cost $10,000 per mile, plus approximately 25–30 per cent more to account for the difficulties to construction posed by the hilly terrain).

[53] For a description of Mr. Solot's qualifications, *see supra,* p. 43, note 48.

sold. Waterwood is approximately 100 highway miles north of Houston. (*Id.*) At the time of trial, 7,000 acres of Waterwood had been platted and were for sale; Horizon held the remaining 18,000 in acres in reserve. Waterwood borders the 90,000 acre Lake Livingston, fronting 44 miles of the lake's 450 mile shoreline. (RPF 30) Lake Livingston is the second largest artificially-made lake in Texas, and the largest lake completely within Texas' borders. (*Id.*)

Unlike Horizon's other properties, Waterwood was designed primarily for resort and second home end use, although Horizon also envisioned a demand for primary homesites to house a permanent population of retirees and a workforce employed in the Waterwood area.

The homesites projected were for single family and multi-family dwellings. Sales included lots fronting Lake Livingston and Waterwood golf course. Complaint counsel allege deception in Horizon's represented end use, arguing, that due to an oversupply of similar recreational communities in the same market, Horizon's claims regarding time to development and resale of Waterwood lots were overly optimistic.

At trial, complaint counsel's sole witness was Professor Howard Stevenson.[54] The Commission can find no evidence indicating that Professor Stevenson relied on, or produced, absorption studies in preparation of his testimony. It appears, rather, that Professor Stevenson's opinion was based solely on his having visited the Houston area just prior to appearing in this proceeding. He testified to the existence of a number of similar [47]recreational communities in the Houston market area, pointing out that several of these communities were already complete with marinas and utilities. He testified that several communities were being developed by firms with assets greater than or equal to Horizon's, including one community which was being developed by a subsidiary of the Exxon Corporation. Professor Stevenson concluded that due to the number of recreational communities in the Houston market, relative to the demand for such communities, Waterwood would have an insufficient absorption within the foreseeable future to be considered an excellent, financially risk-free, short-term investment. (Stevenson, Tr. 6770–72)

Professor Stevenson further pointed out that when Horizon disposes of its original 7,000 acres of platted lots, it can then market its remaining 18,000 acres. In that event, consumers seeking a resale market for their land would come into competition with Horizon's

[54] For a description of Dr. Stevenson's qualifications, *see, supra*, p. 35, note [35].

selling efforts. (Stevenson, Tr. 6762) Complaint counsel argue that this constitutes deception, because prospects believed that they would be able to resell after absorption of the original 7,000 acres.[55]

Respondent argues that Professor Stevenson's testimony was unreliable because of his failure to provide a data base for his conclusions. Respondent produced three expert witnesses whose testimony relied on absorption analyses of Waterwood. We agree with respondent that its witnesses' testimony concerning Waterwood absorption were more reliable than complaint counsel's. But our analysis of the evidence offered by respondent's witnesses leads to a finding that respondent violated Section 5.

Charles Osenbaugh testified as an expert for Horizon.[56] In its proposed findings, respondent characterizes Mr. Osenbaugh's testimony as suggesting that "an extensive resale market would [48] develop by 1984." (RPF 186) We believe that this statement mischaracterizes his testimony, the thrust of which was not that a resale market would exist *by* 1984, but that none would exist *prior* to 1984 because lots would have no resale value without utilities, which Waterwood Improvement Association was obligated to install by 1984.[57] Assuming that utility installation begins by 1984, approximately eleven years after sales began, a resale market might begin to develop at that time. (Osenbaugh, Tr. 15,671) If Mr. Osenbaugh is correct that no significant resale market will develop until utilities are substantially in place, we conclude that an adequate resale market cannot exist within the short-term time frame represented by Horizon.

Horizon called two other expert witnesses, Dr. Stevens and Alan Nevin, both of whom agreed that absorption of Waterwood will occur by the year 2005.[58] Both relied on Dr. Stevens' absorption studies extending to that date. The unmistakable inference from their testimony is that absorption is not likely to be sufficient at any time before the end of this century. Additionally, these studies did not

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[55] Detailed findings concerning the lack of a resale market for undeveloped Waterwood lots, at the time of trial, are found at I.D. 126.

[56] Charles Osenbaugh is a real estate appraiser and consultant with Osenbaugh & Associates. He is a member of the American Institute of Real Estate Appraisers and a Senior Real Estate Appraiser. He has taught for the Society of Real Estate Appraisers, and at the University of Oklahoma, University of Santa Clara, Louisiana State University and University of Houston. Osenbaugh & Associates have performed numerous appraisals for the federal government, State of Texas, several school districts and many private corporations. Mr. Osenbaugh has testified as an expert appraiser in the United States Tax Court, federal district courts and state and county courts in Texas. (I.D. 116)

[57] Waterwood Improvement Association was obligated to construct fronting roads and extend utility service to the community within ten years from the date of a sale. Under the terms of this land sales contracts, consumers were assessed both an annual charge ($120 for single family homes) and a capital improvement charge ($2000 for single family lots) to pay for these services. (I.D. 81)

[58] For a description of Dr. Stevens' qualifications, *see supra*, p. 27, note [29]; for a description of Mr. Nevin's qualifications, *see, supra*, p. 39, note [42].

contemplate resale competition from Horizon's remaining 18,000 acres of unplatted land.

We hold that the preponderance of record evidence establishes that Waterwood is not an excellent, financially risk-free, short-term investment, and that in marketing them as such Horizon violated Section 5 of the FTC Act. [49]

Conclusion

In sum, we have considered in detail the truth of respondent's claims concerning the investment value of its properties. We have concluded in the property-by-property analyses that the various absorption studies establish the falsity of a number of Horizon's representations: the population surrounding these properties has not increased at a rate sufficient to absorb Horizon properties over the short-term; El Paso and Alberquerque do not have locked-in growth patterns toward Horizon properties; and, neither the Horizon Corporation, the improvement associations, nor any other developer could have been expected to carry out respondent's master plan for development. Thus, based on the absorption analysis, we have found that respondent's properties will not be placed into residential or commercial end uses in a short-term period of less than twenty years.

The preponderance of credible evidence adduced at trial indicates that substantial development in any of the properties will not begin to occur prior to the year 2000, and most probably will take place many years after that, rendering the properties an inappropriate *short-term* investment, which is how they were marketed. The record indicates that either insufficient populations will exist to occupy and spur development of certain properties, or that an oversupply of undeveloped land coupled with multidirectional growth patterns in neighboring cities will result in much of Horizon's land remaining unoccupied and undeveloped at least into the next century.[59] It is also clear from reading Horizon's contractual documents, where development obligations are carefully omitted, that Horizon never intended to develop any of its properties outside of the core areas.[60] Horizon argues that its initial expenditures were meant to attract industry, homeowners and other developers who would in turn

[59] The ALJ found that "The overriding defect in all of Horizon's properties is their size in relation to the markets in which they are situated. The absorption of these properties is projected so far into the future that it is impossible to foresee the ultimate risks that may exist." (I.D. p. 277) We concur in his statement of the overall problem with Horizon's marketing plan.

[60] Horizon disclosed in its annual financial report to the Securities and Exchange Commission what it failed to disclose to its customers: "The 'laying out and planning' of a project or community is not analogous to the 'development' of a project or community." (Horizon's SEC 10–K report for fiscal 1976, CX 67c)

assure development. (*See, e.g.*, RAB 29–32) However, by fractionalizing the ownership of the land in all of its properties among individual consumers scattered throughout the country, Horizon ensured the frustration of any coherent development plan that some other developer might have otherwise wished to undertake. Horizon's argument further **[50]**lacks credibility because Horizon knew, or with the exercise of reasonable diligence should have known, that its land would remain unused as residential or commercial property throughout this century. Because no resale market will develop for Horizon's residential and commercial lots within the foreseeable future, residential and commercial uses cannot be considered to be reasonable end uses for those lots. It also follows that because no resale market existed for *any* of Horizon's undeveloped lots, no difference in value could have existed between Horizon's differently zoned lots. (*See* I.D. pp. 265–66)

On the basis of the foregoing analysis of the evidence applied to the factors[61] expert witnesses identified as most important in evaluating the quality of land investments, we hold Horizon's claims that its land was an excellent, financially risk-free, short-term investment were false, misleading and deceptive and a violation of Section 5 of the FTC Act.

III. HIGH PRESSURE SALES TACTICS

Complaint count XVIII alleges deception or unfairness in Horizon's sales practice of representing, "directly or by implication, that a prospective purchaser must purchase a lot immediately to insure that the price will not increase or that the desired location will be available."

Based on testimony of former sales representatives and consumers, the ALJ found that Horizon used representations of periodic price increases to accomplish three purposes: to create a sense of "urgency" in the sales presentation; to mislead consumers into believing that a rise in Horizon's selling price indicated an increase in the investment value of the land; and to aid in reloading sales to existing customers. (His findings are summarized at I.D. 71–72; *see also* I.D. 68. In general, we uphold his findings of fact, with the modifications enumerated in Appendix A.) **[51]**

Horizon employed a number of techniques to stimulate immediate purchases. For example, sales representatives interrupted in-home

[61] The Commission's consideration of evidence regarding the first factor alone enables us to conclude that Horizon land was not an excellent, risk-free, short-term investment. Our consideration of evidence regarding the second, third and fourth factors confirms this conclusion. Therefore, complaint counsel's failure to meet their burden of proof on the last factor is not fatal to their case.

sales presentations to make phone calls to Horizon's home office in Tucson, on the pretense of urgently trying to reserve a lot for the consumer while he or she decided on whether to purchase the lot. Sales representatives sometimes called the Tucson office on the pretense of ascertaining whether a specific lot remained available. The call was unnecessary, as one former sales representative testified, because lots in a given unit or subdivision were generally allocated to specific sales representatives for specific days or evenings. One former sales representative testified about a "reloading" technique whereby a representative arrived at a consumer's home to update the consumer on previously bought property. While there, the representative received a pre-arranged phone call informing him or her that a piece of property, with a specific use designation, was available for about an hour or so. Similar techniques were used at dinner parties, where sales representatives announced that they were reserving choice lots for the consumers sitting at their table. (I.D. 71)

Horizon trained sales representatives to represent to consumers that if they did not immediately purchase a specific lot, the lot's purchase price could significantly rise overnight, the specific lot would probably be sold to someone else in the immediate future, or that an entire Horizon property would be imminently sold out. Horizon's goal was to create an atmosphere where consumers believed that if they did not act immediately to purchase Horizon land, they would be forever foreclosed from participating in Horizon's excellent investment opportunity. (I.D. 71–72)

Consumers testified that they were told of "hot property", i.e. property that would be sold shortly, or property that would imminently rise in value and price. (*Id.*)

The ALJ concluded that these practices were deceptive because Horizon's undeveloped lots were sufficiently fungible so that there would be an abundant supply of them at all times. (I.D.p. 267) He concluded that the practices were unfair because they placed "unwarranted sales pressure" on prospects, depriving them of a full opportunity to consider or obtain advice about their purchase. (*Id.*)

The Commission does not accept "unwarranted pressure" as a test of unfairness under Section 5. We hold, however, that Horizon's high pressure sales tactics violated Section 5 because they occurred in the context of pervasive deception as to material facts. Specifically, representations that price and value of land would imminently increase and that land would become imminently unavailable were artificial devices contrived by Horizon's **[52]**management to mislead consumers. Respondent used price increases to represent past and

future increases in the value of its land, even though its prices bore no relation to the land's market value. (I.D. 71–72; I.D. pp. 258, 265; *see* discussion *supra,* pages 20–23) Respondent implied that consumers would lose the opportunity to invest in Horizon land if they did not act immediately, even though as of August 1975, Horizon's vast properties contained approximately 356,000 lots, nearly 80,000 of which were unsold even after many years of intense marketing. (I.D. 23)[62]

In this context of deception, consumers were pressured into making immediate decisions, without the benefit of sober reflection or the aid of a qualified real estate professional. The Commission concludes that Horizon's practice of misleading consumers into believing that they had to purchase immediately in order to avoid imminent price increases and to assure availability of lots, constitutes a deceptive trade practice under Section 5 of the FTC Act. **[53]**

IV. HORIZON'S CONTRACT PROVISIONS

Five provisions of Horizon's standard form contracts were challenged in this proceeding: (1) the integration clause; (2) the forfeiture clause; (3) the property visit credit; (4) the guarantee; and (5) the exchange privilege.[63]

The ALJ found that all five contract provisions were deceptive

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[62] Horizon's appeal brief states that the "crucial issue is the truth or falsity of the alleged representations." (RAB 37) The brief later defines these representations as those "concerning the need for promptness." (RAB 38) Respondent argues that so long as price increases were actual, and that so long as a possibility existed that a prospect could lose a specific lot, Horizon's representations were not false. Horizon cites the following as authority to support the proposition that it cannot be a violation of Section 5 to inform consumers of unavailability of supply or of price increases when such representations are not false: *Guides Against Deceptive Pricing,* 16 C.F.R. 233 at 233.5 (1968); *Readers Digest Association, Inc.,* 64 F.T.C. 1276 (1964); *Prentice-Hall, Inc.,* 64 F.T.C. 30 (1964); *Velox Service, Inc.,* 56 F.T.C. 1311 (1960); *Artistic Modern, Inc.,* 54 F.T.C. 225 (1957).

Horizon's reliance on these authorities is misplaced. In the instant case, Horizon's representations that price increases reflected increases in investment value and demand, and that Horizon properties would be imminently sold out, were false, and Horizon's representations that there was a "need for promptness" were also untrue. The cited cases, in fact, resulted in orders prohibiting direct or indirect representations that supplies were limited, when such was not the case. Thus, Horizon's representations were unlawful under the authorities it cites.

[63] Horizon has used two different formats for its land sales contracts. During most of the period in which Horizon sold land, its contracts consisted of two separate documents—a Receipt of Deposit (hereinafter "Receipt") (*see, e.g.* CX 141) and an Agreement for Deed (hereinafter "Agreement") (*see, e.g.* CX 151). The Receipt was a single page document, containing the price of the property, the terms of financing and one version of the Horizon Corporation guarantee. The Receipt incorporated by reference the provisions contained in the Agreement. The Agreement was also a single page document containing additional conditions of sale which formed the principal terms of the contract between Horizon and the purchaser. These conditions included a second version of the guarantee, the property visit credit, the exchange privilege and the forfeiture and integration clauses discussed below.

Beginning in 1976, Horizon combined these documents into a single contract entitled "Contract for Purchase of Land" (hereinafter "Contract") which it continued to use at least until the record in this proceeding closed in 1978. (*See, e.g.* RX 984) The conditions of sale are set forth at the start of the Contract and are individually captioned. In addition, a section headed "Highlights of this Contract" directs the consumer's attention to specific provisions, including those relating to default and forfeiture, taxes and prepayment. The integration clause is set forth in a paragraph entitled "General Provisions". Only some contracts retain the exchange privilege. (*Compare* RX 180 (contract for Horizon City with exchange privilege) *with* RX 979 (contract for Paradise Hills without exchange privilege)) The property visit credit and the Horizon guarantee are omitted from all post-1976 Contracts.

and/or unfair. (His conclusions regarding the integration and forfeiture clauses appear at I.D.pp. 288–290; his conclusions concerning the property visit credit, guarantee and exchange privilege are set forth at I.D.p. 267.)

For the reasons set forth below, we reverse his findings of liability concerning the integration clause, property visit credit, guarantee and exchange privilege used in Horizon's land sales contracts. We uphold his finding of liability concerning the forfeiture clause. **[54]**

The ALJ found that Horizon's land sales agreements were contracts of adhesion because one party (i.e. the consumer) must "adhere to the whole contract or forego entering into any contract." He concluded that the adhesive nature of Horizon's contracts was important because "the standards of fairness to be applied and the legal consequences which ensue depend in a large part on the method of contracting." (I.D.p. 288)[64]

We agree that Horizon's land sales contracts, in both their pre- and post- 1976 forms, were adhesive in nature. We also agree that that conclusion establishes the level of scrutiny to be applied to the five provisions at issue. Standard form contracts, negotiated on a take-it-or-leave-it basis, are unexceptional in consumer transactions. However, if a contract is adhesive in nature and its terms appear unreasonably harsh, the Commission will, as the courts have, scrutinize those terms carefully to determine if they are unconscionable, unfair, or deceptive. As the discussion below will indicate, the determination whether a term is unfair or deceptive depends on its operation in a specific factual context.

The courts have developed standards for defining and scrutinizing adhesion contracts. If a contract is memorialized in a pre-printed form, they will construe its terms most strongly against the party who prepared it. They will also consider the ability of the weaker party in the transaction either to bargain or shop for better terms. (*See, e.g., Henningsen v. Bloomfield Motors, Inc.,* 161 A.2d 69, 84–97 (1960); *Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445 (D.C. Cir. 1965; *Fleischmann Distilling Corp. v. Distillers Co., Ltd.,* 395 F. Supp. 221 (S.D.N.Y. 1975); and *Farmer's Union Grain Terminal Ass'n v. Nelson,* 223 N.W. 2d 494 (N.D. 1974))

Commentators have also defined contracts of adhesion as those arising from a situation where one of the parties is in a disadvanta-

[64] In urging reversal of the ALJ's conclusions, respondent argues as a threshold matter that the adhesive nature of Horizon's land sales contracts was neither alleged in the complaint nor litigated and briefed by the parties in the proceeding below. (RAB 44) We cannot accept this argument because complaint counts XXIII and XXVI both allege the existence of elements critical to a determination of whether the Horizon contract has features of an adhesion contract. Further, the record taken as a whole contains evidence that is more than adequate to define the nature of the transaction between Horizon and its customers, especially their relative bargaining positions when contracts were signed.

geous position because the contract's provisions are standardized and stereotyped. They agree that such contracts are usually narrowly construed against the author. (*See* 4 *Williston* **[55]***on Contracts* Section 626 at 855–57 (3d ed. 1961); *see, also, Corbin on Contracts* Sections 1–559 A–I (Supp. 1980); J. Calamari and J. Perillo, *Contracts,* Sections 1–3 at 6 (2d ed. 1977); Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract", 43 Colum. L. Rev. 629 (1943); and Duncan, "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code", 34 L.A. L. Rev. 1081 (1974))

The Comments to Article Two of the Uniform Commercial Code (UCC) have adopted these principles in defining contracts which the court may refuse to enforce on grounds of unconscionability. (*See* Comments to UCC 2–302:10–19 at 400–405 (2d ed. 1970)) The UCC Comments suggest that inequality of bargaining power, the relative experience of the parties and the circumstances surrounding execution of the contract should all be considered in determining whether its terms are unconscionable.

In addition, the Commission, in 1975, promulgated a trade regulation rule concerning the Preservation of Consumers' Claims and Defenses, 15 C.F.R. 433 (hereinafter "Holder Rule"), relying in part on the law of adhesion contracts to find unfair and deceptive standard form clauses that cut off consumers' claims and defenses against assignees of certain types of credit contracts. The Statement of Basis and Purpose for the Holder Rule states:

> [P]romissory notes and waivers of defenses are inserted as boilerplate in installment agreements. . . . [C]onsumers rarely comprehend the significance of these devices at the time when the transaction is consummated. . . . *The Commission believes that relief under Section 5 of the FTC Act is appropriate where sellers or creditors impose adhesive contracts upon consumers, where such contracts contain terms which injure consumers, and where consumer injury is not off-set by a reasonable measure of value received in return.* (emphasis added) 40 Fed. Reg. 53523–53524 (1975).

The Commission then went on to consider the nature and scope of the consumer injury caused by holder-in-due-course clauses, their offsetting benefits and the full range of public policy issues affecting any determination whether they are deceptive or unfair.

The Commission's use of the law of adhesion contracts in the Holder Rule Statement of Basis and Purpose suggests the appropriate relationship between the definition of a contract as adhesive and a declaration that any of its provisions are unfair or deceptive under Section 5. A simple finding that a contract is adhesive does not end the inquiry. Rather, that finding, as a matter of policy, defines the

level of scrutiny the Commission applies to an inquiry into whether any of that contract's terms is unfair or deceptive. **[56]**

Applying the criteria outlined by the authorities as discussed above, we must agree with the ALJ that Horizon's land sales agreements (both pre- and post- 1976 versions) had features of an adhesion contract. They were all pre-printed and contained standard boilerplate provisions. There is no evidence on the record that consumers ever did or could have bargained for modifications in the conditions of sale that are at issue in this proceeding. Thus, at least with respect to those provisions, the contracts were presented to consumers on a take-it-or-leave-it basis. Consumers were in an unequal bargaining position vis-a-vis Horizon both because, as lay investors, they were generally unsophisticated concerning the key factors which must be weighed in making an informed decision to invest in undeveloped land and because Horizon misrepresented the nature and value of the land it was selling.

Respondent has argued that its contracts cannot correctly be characterized as adhesion contracts because: (1) the fact that a contract consists of standard terms does not make it adhesive; (2) purchasers were able to negotiate the terms of payment on their contracts; and (3) contracts of adhesion by definition must concern necessities of life which are "unobtainable elsewhere" and Horizon lots were neither necessities of life nor unique. (RAB 44)

As we have indicated above, we do not rely on the simple fact that Horizon's agreements were pre-printed in finding them adhesive. Rather, we have used other criteria in conjunction with the pre-printed nature of Horizon's forms to define their adhesive nature.

Consumers' ability to "negotiate" one aspect of their contracts with Horizon—i.e. to choose one of several payment plans—similarly cannot vitiate our conclusion that the contracts had adhesive features. Consumers did not have the opportunity to negotiate the other major conditions of sale imposed by Horizon and it is those non-negotiable provisions that are challenged in this proceeding.

In asserting that adhesion contracts must by definition apply only to the purchase of necessities of life, Horizon relies solely upon a New York state court case, *Weidman v. Tomaselli,* 81 Misc. 2d 328, 365 N.Y.S. 2d 681 (1975), *aff'd* 84 Misc. 2d 782, 386 N.Y.S. 2d 276 (App. Term 1975). **[57]**

In fact, courts are divided on the question of whether the law of adhesion contracts is limited to agreements for the purchase of necessities.[65] And, recent commentary on this issue does not

[65] For examples of cases where the doctrine has been applied to sales of goods or services which cannot be considered necessities of life, *see Bank of Indiana, Nat. Ass'n v. Holyfield,* 476 F. Supp. 104 (S.D. Miss. 1979)

(Continued)

acknowledge any "necessities" limitation. (*See Corbin on Contracts* Sections 1–559 A–I (Supp. 1980)) Further, the unconscionability provisions of the Uniform Commercial Code contain no limitation on the type of contract to which special scrutiny should apply. (*See* Comments to UCC 2–302:1 *et seq.* at 391 (2d ed. 1970))

For purposes of applying Section 5, the Commission believes that the authorities omitting this limitation are better reasoned. It therefore concludes that an adhesion contract analysis is applicable in Section 5 proceedings to agreements concerning the purchase of goods and services besides those viewed strictly as necessities.

As for respondent's contention that an adhesion contract can only exist where the goods or services in question are "unobtainable elsewhere", we can find no support for this suggested limitation in any generally recognized authorities which discuss the subject. Further, as complaint counsel points out, the only case cited by respondent as support for this proposition involved a situation where a farmer entered into a standard form contract to sell grain but, following the buyer's breach of the contract, the farmer managed to sell his grain to another party. (C.Ans 43, *citing Farmer's Union Grain Terminal Ass'n* v. *Nelson,* 223 N.W. 2d 494, 496 (N.D. 1974))

Having concluded that Horizon's contracts were adhesive in nature, we turn to an examination of the five challenged provisions. [58]

A. Integration Clause

Count XXV of the complaint alleges that respondent utilizes a standard form contract which contains a "condition of sale" to the effect that there exists no understanding or agreement between the parties except as "expressly set forth" in their written land sales contract. The complaint charges that the use of such an integration clause is unfair or deceptive because "respondent makes representations . . . which differ in material respects from the obligations of respondent or purchasers under said contract."[66]

In sustaining this allegation, the ALJ concluded that respondent's inclusion of an integration clause is "oppressive, unscrupulous and unfair" and causes substantial injury to consumers. However, he did not define the precise nature of this injury other than to state that

(voiding deficiency clause in dairy farmer lease agreement); *Steven v. Fidelity and Casualty Co. of New York,* 377 P.2d 284 (Cal. 1962) (voiding a clause limiting coverage of airline passenger accident insurance); *Gray v. Zurich Insurance Company,* 419 P.2d 168 (Cal. 1966) (voiding an exception clause to an insurer's general duty to defend in a comprehensive personal liability policy); and *La Sala v. American Savings & Loan Association,* 489 P.2d 1113 (Cal. 1971) (invalidating certain clauses found in loan contracts where the purposes to which the loan proceeds were applied were not part of the factual record of the case).

[66] The integration clause included in Horizon's contracts reads:

There is no understanding or agreement between the parties except as expressly set forth herein. . . . RX 984–C

the integration clause makes "the finality of the contract's terms explicit" and that Horizon's contracts contained "Draconian terms". (I.D.p. 289)

The Commission considers a finding of substantial, unjustified consumer injury essential to a conclusion that a business act or practice is unfair.[67] Therefore, the issue presented is whether the record in this proceeding demonstrates any substantial consumer injury flowing from Horizon's use of an integration clause. For the reasons discussed below, we find that it does not.

An integration clause reenforces the standard legal interpretation of land sales contracts which prevails in American jurisprudence. Under the statute of frauds, contracts for the sale of land must be in writing to be enforceable. *Restatement of Contracts* Section 178 (1932) If the written contract appears complete on its face, courts will generally assume the contract is intended by the parties to be a complete expression of their agreement. The addition of an integration clause is generally viewed by the courts as a further indication of the parties' intent that the contract serve as a complete expression of their agreement. **[59]**3 *Corbin on Contracts* Section 578 (1960 and Supp. 1980) If the Court determines that the contract is a complete expression of the parties' agreement, then under the parol evidence rule neither side may introduce into a court proceeding any evidence of oral (or written) representations or agreements made prior to or contemporaneous with the execution of the final written contract. *Restatement of Contracts* Section 237 (1932)

However, the statute of frauds, the parol evidence rule and the inclusion of an integration clause do not prohibit a purchaser of land from introducing oral or written evidence into a court proceeding to establish that the parties do not have a binding contract because of illegality, fraud, duress, mistake or insufficiency of consideration. *Restatement of Contracts* Section 238 (1932)

Thus, the inclusion of an integration clause in Horizon's standard form contracts will not, as a legal matter, bar Horizon purchasers from suing the company and asserting claims of fraud at the inception. At most, the presence of the integration clause will introduce an additional legal issue into the proceeding. Given the operation of the contractual principles described above, we cannot find that the potential evidentiary implications of the clause cause injury to consumers.

Complaint counsel suggest that the real reason for the insertion of the clause is to discourage consumers from pressing otherwise valid

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[67] *See, e.g.*, Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). *See, infra*, p. 62, note[71].

claims. The consumer injury caused by the clause is that "consumers induced by oral or other claims to sign contracts will believe that the clause is fully enforceable when respondent invokes it to defeat their claims." (C. Ans 44–45)

Complaint counsel do not cite any record evidence that consumers have in fact been chilled from asserting their legal rights by Horizon's integration clause or that respondent ever misrepresented the nature or effect of the clause. And, in fact, the one piece of evidence cited by the ALJ in support of his finding of unfairness is testimony by consumers that they believed statements by sales representatives to be part of their contractual agreements with Horizon. (I.D.p. 289)

In the absence of concrete evidence that consumers were chilled from asserting their legal rights when they read the integration clause contained in Horizon contracts, or that respondent misrepresented the operation of the clause, we decline to find that respondent's use of such clauses constitutes an unfair practice. Accordingly, we reverse the ALJ's decision regarding this contract clause. **[60]**

B. Forfeiture Clause

Complaint counts XXIX and XXXIII contain allegations concerning the forfeiture clauses included in Horizon's land sales contracts. Count XXIX alleges that the forfeiture clause set forth in the pre-1976 Horizon Agreement—which allows Horizon to retain *all* sums paid by the purchaser in the event of a default on *any* installment—is unfair because "the sums retained by respondent are not calculated to bear any relation to actual damages . . . sustained . . . by reason of the purchaser's default." Count XXXIII alleges that respondent's "continued retention" of any payments which are in excess of "reasonable damages" is also an unfair act or practice.

At trial, the evidence revealed that Horizon has used three different versions of a forfeiture clause in its standard form contracts. The first version was in use in the early (pre- 1976) sales contracts which are the subject of the complaint. In the event of purchaser default on an installment due under the contract, this early forfeiture clause provides, in the alternative, that Horizon may terminate the contract and retain as liquidated damages all sums previously paid by the purchaser, or that Horizon can pursue any other remedy available to it at law or in equity.[68]

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[68] Horizon's pre- 1976 forfeiture clause is one of several conditions of sale continued on the back of the Agreement for Deed. The clause provides as follows:

This Agreement is not divisible and prompt payment of all sums due from Buyer under this Agreement is a condition of this Agreement and failure to make such payments according to the plan selected by Buyer shall entitle Seller to terminate this Agreement and re-enter and take possession of the property and to retain all

(Continued)

In 1976, Horizon modified this version of the provision to make forfeiture Horizon's sole remedy for a purchaser's **[61]**default, expressly disclaiming any personal liability on the part of the purchaser.[69]

The most recent contract contained in the record, RX 981, reveals yet a third variety of forfeiture clause. This contract, dated June 1977, provides that upon a purchaser's default or cancellation, Horizon must refund any sums paid toward the principal by that purchaser in excess of 45 percent of the purchase price. This refund must be made within 30 days.[70]

The ALJ found that at least the first two versions of Horizon's forfeiture clauses were unfair because they were "penal" in nature, were contained in an adhesion contract and operated to "unjustly enrich" the seller. (I.D.p.290) **[62]**The ALJ entered an order prohibiting Horizon from collecting or retaining upon default more than its actual damages both under future contracts and under contracts which are in existence at the time that the order becomes final. But he declined to grant complaint counsel's request for retroactive relief for consumers who forfeited payments before the order's effective date, citing the limitations imposed by *Heater* v. *FTC,* 503 F.2d 321 (9th Cir. 1974). (I.D.p. 293)

For the reasons explained below, we affirm the ALJ's finding of unfairness with respect to those versions of Horizon's forfeiture clause which allowed the company to retain upon default all sums previously paid by the buyer. To reach this conclusion, we apply the legal standards embodied in our unfairness authority.

In finding the existence of legal unfairness, the Commission focuses primarily on two criteria: the existence of unjustified, substantial consumer injury and the violation of established public policy.[71] To be legally "unfair", consumer injury must satisfy three

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sums paid under this Agreement as liquidated damages, or, at the option of Seller, to pursue any other appropriate remedy available at law or in equity.

CX 142–B

[69] Most of the contracts now used by Horizon contain a separately numbered and titled paragraph captioned "Buyer's Default." That paragraph states:

Buyer shall have no personal liability under the terms and conditions of this contract and Horizon's sole remedy in the event of Buyer's default hereunder shall be to terminate this contract and re-enter and take possession of the property and retain all sums paid under this contract as liquidated damages.

RX 984–C

[70] The only contract in the record that contains this language is for Rio Communities. Paragraph 8 of the contract provides:

Buyer's Cancellation or Default

Buyers shall have no personal liability under the terms and conditions of this contract and Horizon's sole remedy in the event of Buyer's cancellation or default hereunder shall be to terminate this contract and re-enter and take possession of the property and to retain all sums paid under this contract as liquidated damages except for any principal payments made in excess of 45% of the purchase price which shall be refunded to the Buyer by Horizon within thirty (30) days from declaration of default or notice of cancellation. . . .

[71] *See* Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). The letter delineates the Commission's views of the boundaries of its consumer unfairness

(Continued)

tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice at issue produces; and it must be an injury that consumers themselves could not reasonably have avoided. **[63]**

The record below clearly establishes that substantial consumer injury occurred as a result of Horizon's retention of all sums paid in the event of buyer default. (I.D.131) The record shows that for the most part, the 100 per cent forfeiture provisions enabled Horizon to retain sums greatly in excess of any actual damages occasioned by purchaser default. We are unable to detect any countervailing benefits to consumers or competition that the practice produces. Further, we conclude that the injury produced by the 100 percent forfeiture clauses could not reasonably have been avoided by consumers who were unable to bargain over these clauses which were contained in a contract that is adhesive in nature and signed in an atmosphere of deceptive misrepresentations by the seller about the value of the investment and the nature of the deal being offered under the contract.

Respondent argues that no consumer injury was caused by the presence and operation of the forfeiture clauses. It contends that the ALJ's decision was based solely on an injury which might "hypothetically" flow from the use of a forfeiture clause. (RAB 47) Respondent apparently overlooks the specific and substantial consumer injury demonstrated in the record. (CX 852).

Respondent also contends that the ALJ improperly included interest payments in the calculation of consumer injury. (R.Ans 41). We do not reach the question of whether in an ordinary land sales transaction a forfeiture clause which allows a seller to retain interest payments could violate Section 5. We do find that where, as in this case, the transaction occurred in an atmosphere of pervasive deception about the value of the purchase and the nature of the terms and conditions of sale coupled with the adhesive nature of the contract in question, the ALJ properly included interest payments retained under a 100 percent forfeiture clause in his calculation of consumer injury.

The second criterion considered by the Commission in determining a practice to be legally unfair is whether that practice violates public policy. We conclude that that criterion is satisfied in this case. **[64]**

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jurisdiction. The criteria relied on here were first summarized in 1964, when the Commission issued its Statement of Basis and Purpose for the trade regulation rule entitled Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964). Those criteria were later quoted with apparent approval by the Supreme Court in *FTC* v. *Sperry & Hutchinson*, 405 U.S.223, 244–45 n. 5 (1972).

Horizon argues that forfeiture clauses do not violate any recognized public policy because most states do not prohibit such clauses. But that argument, directed at forfeiture clauses in general, is wide of the mark. Horizon's forfeiture clause offends the clear public policy that the law should not countenance harsh contract terms which are unreasonably favorable to one party when the other party lacked meaningful choice because of deception in the inducement of the contract. The public policy abhorring unconscionable terms when the contract has been negotiated in an atmosphere of deception has been clearly articulated by the courts[72] and is the basis for the Uniform Commercial Code's unconscionable contract provisions. (UCC Section 2–302 (1970 version)) Also, we note in passing a developing trend in state and federal law toward the imposition of limitations on the provisions of forfeiture clauses in installment contracts for the sale of land.[73] Thus, there is no developing trend in the law that is inconsistent with the position we take here. Rather, the trend is to the contrary. **[65]**

In sum, we find that the two versions of Horizon's forfeiture clause which allow the company to retain upon default all sums previously paid by the buyer were contained in a contract which is adhesive in nature and was negotiated and signed in an atmosphere of unequal bargaining power, high pressure sales tactics and deceptive misrepresentations; and we hold that they are unfair in violation of Section 5 of the FTC Act. Because the forfeiture provisions at issue in this case arise in the context of land sales accomplished through a deceptive marketing scheme, we need not reach the question of

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[72] *See, e.g. Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir.1965); *Fleischmann Distilling Corp.v. Distillers Co., Ltd.*, 395 F. Supp.221, 232 (S.D.N.Y. 1975); *New York Jewelry Co.*, 74 F.T.C. 1361, 1406–07, 1412 (1968).

[73] The Interstate Land Sales and Full Disclosure Act (ILSFDA) Amendments of 1979 expressly provides that any contract for the sale of land in interstate commerce which does not contain a clause limiting forfeiture rights of the seller in the event of a buyer's default to 15 per cent of the purchase price or the seller's "actual damages" (whichever is greater), can be revoked by the purchaser any time within a two-year period from the date the contract was signed. 15 U.S.C. 1703 (1979). Also, Maryland and Oklahoma have enacted statutes specifically forbidding forfeiture clauses. (Md. Real Property Code Ann. 10–101 to 108 (1974 & Supp. 1980); Okla. Stat.Ann. Tit. 16, 11A (West Supp. 1980)) Ohio effectively prevents forfeiture clauses from resulting in the payment of penalties by requiring judicial sale of the property when, prior to default, the customer has paid 20 per cent or more of the purchase price. (Ohio Rev. Code Ann. 5313.01–.10 (Page 1970)) Many other states provide grace periods during which the buyer can remedy his or her default. The time periods vary from ten days in South Dakota to as much as one year in North Dakota. (S.D. (Compiled) Laws Ann. 21–50–1 to –3 (1979); N.D.Cent.Code 32–18–01 to 04 (1976)) An alternative statutory approach is to impose mortgage foreclosure requirements on the termination of land contracts. (*See, e.g.*, Fla. Stat. 697.01 (1969) and Mich.Stat.Ann. 27A.3101 (1962))

The courts have developed many other tools to blunt the force of strict forfeiture. Waiver of default by the vendor is one concept which is frequently employed. (*See, e.g., In re Northern Ill. Dev. Corp.*, 309 F.2d 882 (7th Cir.1962), *cert. denied*, 372 U. S. 965 (1963)) Courts have also recognized an equitable right of redemption. (*See, e.g., Ward v. Union Bond and Trust Co.*, 243 F. 2d 476 (9th Cir. 1957); *Nigh v. Hickman*, 538 S.W.2d 936 (Mo.App.1976)) For an overview of the trend of state court decisions in this area, *see* G. Nelson and D. Whitman, "The Installment Land Contract: A National Viewpoint", B.Y.U.L. Rev. 541 (1977) and J. King, "Forfeiture: The Anomaly of the Land Sale Contract", 41 A1.L.Rev. 71 (1977).

whether the forfeiture clauses at issue in this proceeding are, without more, unfair in a land sales transaction. **[66]**

C. Property Visit Credit, Guarantee and Exchange Privilege

1. Property Visit Credit and Guarantee

The property visit credit provision of Horizon's land sales contracts says that if consumers visit their land within one year of purchase, Horizon will give them a "credit" in the form of a five percent deduction (up to a maximum amount of $600.00) from the cash price of the lot. The amount of the credit will be deducted from their account balances at the tail end of their payments. The credit is offered "for the purpose of encouraging personal inspection of the subdivision in which the property purchased is located." (*See, e.g.,* CX 152–B)[74]

Receipt of the credit was conditioned on the consumer acknowledging that the land was not misrepresented at the time of sale. While the contract provision described the reimbursement aspects of the credit, it did not mention this requirement. Instead, the requirement was set forth for the first time in a "Property Visit Credit Certificate" that Horizon mailed to consumers in an "important document package" several days after the sale. The pertinent portion of that certificate states:

TO BE COMPLETED AT THE TIME OF PROPERTY VISITATION TOUR

I have seen my land. It is as represented and I am satisfied with my property investment. Please credit my account in accordance with this certificate.

Landowner (s) signature (s) _____

(I.D. 64) **[67]**

The property visit credit provision of Horizon's contract was related to the provision extending a "Horizon guarantee". Indeed, the guarantee presents the converse of the property visit credit waiver requirement: the guarantee states that Horizon will refund all money paid on the property if the property was misrepresented at the time of sale. However, requests for such refunds may only be made at the property in question upon completion of a company-

[74] The full text of this provision reads:

Upon confirmation and acceptance by Horizon Corporation or applicable subsidiary, Buyer will be issued a Property Credit Allowance Certificate in the amount of 5% of the cash price (net additional sales price in superseding sales) up to a maximum amount of $600.00. The Property Visit Credit Allowance is issued for the purpose of encouraging personal inspection of the subdivision in which the property purchased is located. The Allowance granted herein is deductible from the remaining account balance at the time the principal balance is equal to the amount of the Certificate, providing that the personal inspection and company guided tour is made within one (1) year of the date of the acceptance of this Agreement and providing that the payments due hereunder have been current throughout the term of this Agreement.

(CX 152–B)

guided inspection tour which occurs within one year of the date of purchase.[75] Obviously, consumers confronted with both the property visit credit certificate and the guarantee were put to a choice: in order to obtain reimbursement of their travel expenses, they must certify that no misrepresentations occurred. However, by certifying that no misrepresentations occurred, they sacrifice their right to a refund.

The record below indicates that both the property visit credit and the guarantee were used as sales tools by Horizon sales representatives. (I.D. 66) Both provisions were discontinued when Horizon revised its contracts in 1976.

Count XV of the complaint alleges that Horizon's property visit credit is deceptive because respondent has represented, directly or by implication, that it entitles consumers to immediate reimbursement for their travel expenses, when such is not the case. In fact, the complaint continues, the property visit credit merely entitles consumers to a deduction from remaining account balances when those balances equal their travel expenses (i.e. at the tail end of their payments).

The ALJ refused to uphold the allegations contained in Count XV because, although he found that the reimbursement aspect of the property visit credit operates exactly as described in the complaint, he also found that this aspect of the credit was "typically explained accurately to the customers" and that, therefore, no deception occurred. (I.D. 63) Complaint counsel do not appeal this finding. We affirm the ALJ's conclusion. **[68]**

Count XXX of the complaint alleges that the "Property Visit Credit Certificate" used by Horizon further specifies that purchasers may only qualify for reimbursement if (1) they tour their land within one year of the date of purchase and (2) they declare that the land is as it was represented to be and that they are satisfied with their property investments. Count XXX alleges that the imposition of these conditions is an unfair practice because the consumer often cannot ascertain whether misrepresentations have occurred at the time of the property visit.

The ALJ unheld these allegations of unfairness contained in the complaint. He based his conclusions on two facts: (1) the requirement that purchasers declare no misrepresentations had occurred was not

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[75] The guarantee provision read:

Horizon Corporation or applicable subsidiary guarantees to refund all money paid on your property if it was MISREPRESENTED to you at the time of sale. Requests for such refunds may be made only at the property upon completion of buyer's initial company-guided personal inspection tour within one year of the date of purchase by stating the details on the company's refund request form.

(CX 139–A)

adequately explained to Horizon customers and (2) in any case, consumers were unable to execute a knowing waiver because they could not evaluate the investment quality of the property at the time of the property visit. (I.D.p. 267)

Complaint Count XXX also alleges that the guarantee is deceptive because the purchaser may not be able to ascertain whether the property has been misrepresented on a company-guided inspection tour.

The ALJ upheld this allegation, concluding that the guarantee "was presented in a vague manner creating the false implication that it was a money-back guarantee if the purchaser was dissatisfied with the property." (I.D.p. 267)

The Commission is unable to uphold the ALJ's findings that the property visit credit and the guarantee, operating together, were deceptive and unfair. The ALJ's conclusion that consumers understood they would only receive the credit in the form of a deduction at the tail end of their installment payments fatally undermines his findings of liability. Under these circumstances, consumers knew (or should have known) before they visited the land that if they wished a refund, they would never get the opportunity to receive a credit on the account balance because the refund would wipe out the account. Consumers therefore must have understood that the two provisions were mutually exclusive. This understanding removes any deception from Horizon's explanation of the operation of the two provisions.

The Commission recognizes that deceptive misrepresentations continued during company-guided inspection tours. (I.D. 67) These misrepresentations have been considered in our findings concerning Horizon's deceptive sales practices in general. However, we are unwilling to find that these misrepresentations rendered the property visit credit and guarantee *independently* deceptive or unfair in view of our conclusion that consumers understood the operation of the two provisions before they visited the land. **[69]**

2. Exchange Privilege

Horizon offered an exchange privilege to purchasers of its undeveloped lots, which permitted them to exchange their land for land located in other areas, including those where development had occurred, under certain circumstances.[76] No complaint count alleges

[76] A typical clause reads:

At any time prior to delivery of the Warranty Deed, the SELLER agrees to accept the above land in trade, applying the full principal paid, for any other available land, except land located within any designated building area, which is, at the time of exchange, equal to or greater than the original price of the traded property. In addition, upon commitment to buy or commence construction of his home within NINETY (90) DAYS and complete construction within ONE HUNDRED TWENTY (120) DAYS thereafter, PURCHASER

(Continued)

that the exchange privilege clause contained in some of Horizon's contract documents is either deceptive or unfair. Nevertheless, the ALJ found that the exchange privilege was used in "a deceptive and misleading manner", although he did not give any reasons for this conclusion. (I.D. p. 267) [70]

Respondent has argued that its use of the exchange privilege was not only nondeceptive and fair, but actually enhanced the value of Horizon's lots as homesites. Respondent essentially contends that the opportunity to exchange undeveloped lots for lots in developed areas assured that consumers could use their land as homesites when they wanted to. (RPF pp. 183–184; RAB 34–35) Respondent specifically disputes the ALJ's finding elsewhere in his opinion that the privilege has had no impact on the pace of building in Horizon's properties. The ALJ entered this finding because "it is evident that the exchange privilege cannot accommodate all the lot purchasers with a building site" and "Horizon's undeveloped lots were not sold as homesites, but as investments . . . ." (I.D.p. 286)

Complaint counsel defend the ALJ's conclusion, contending that exchange areas in currently developed core areas cannot accommodate everyone and that so-called "satellite core areas" have never materialized. (C. Ans 24) Further, complaint counsel argue that because the exchange privilege is limited to owners of single-family lots, it cannot offer relief to many of the consumers affected by this proceeding. (C. Ans 33)

We must conclude that the parties have fought to a draw on this issue. We decline to uphold the ALJ's finding that the exchange privilege was used in a misleading manner. However, we also reject respondent's contention that the exchange privilege enhanced the investment value of its lots, both for the reasons stated by complaint counsel and because the privilege was limited to those who would commit themselves to starting construction of a home within 90 days of an exchange, and completing such construction within 120 days thereafter. Because of these limitations on consumers' exercise of the exchange privilege, we agree with the ALJ that the privilege did not materially enhance the investment value of Horizon land. [71]

V. HORIZON'S DEFENSES

Horizon asserts a number of defenses to bar findings of liability

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may exchange one single-family residential lot for a similar size lot in any building exchange area within the same development, so long as one is available, without any increase in the purchase price of the land. The then current utility costs to the lot line and proportionate street improvement costs are to be paid for by the PURCHASER at the time construction is to commence, or shall be included in the cost of the house if purchased from the Company.

under Section 5. Respondent maintains that complaint counsel have failed in their burden of proof of establishing a violation of law. Respondent contends that it disclosed all material facts concerning its land through the dissemination of various documents to consumers, and that those disclosures eliminated any possible deception which might otherwise have occurred. Respondent next argues that it should not be held liable for the unauthorized statements of its sales representatives. Lastly, respondent asserts that this proceeding is barred by the doctrines of laches and equitable estoppel.

A. Burden of Proof

Commission Rule 3.51(b), 16 C.F.R. 3.51(b) requires that an initial decision be based upon a consideration of the record as a whole, and supported by reliable, probative, and substantial evidence. (*See Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951)) Respondent contends that the ALJ ignored substantial record evidence in concluding that complaint counsel met its burden of establishing by a preponderance of the evidence that Horizon violated Section 5. (RAB 7–13)

On page 256 of his Initial Decision, the ALJ concluded that Horizon marketed its property as an excellent, risk-free investment. He goes on to state that "[i]n making this determination, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. *See Beneficial Corp. v. FTC,* 542 F.2d 611, 617–18 (3rd Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); *Continental Wax Corp. v. FTC,* 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc. v. FTC,* 329 F.2d 365, 367 (7th Cir. 1964); *Charles of the Ritz Distrib. Corp. v. FTC,* 143 F.2d 676, 679 (2nd Cir. 1944)."

Respondent maintains that in evaluating the record, the ALJ failed to heed the requirement of *Universal Camera,* 340 U.S. at 448, that the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Horizon argues that certain findings of fact could not have been entered if the ALJ had actually considered the record as a whole. (*See* RAB 7–10) In its brief, Horizon asks that the Initial Decision be reversed on this ground. At oral argument, counsel for respondent commented that "[p]erhaps the Commission will have to look at the record as a whole. . . . I respectfully request the Commission do that. . .". (Oral Argument, Tr. 16) **[72]**

The Commission has studied the whole record in this case. We find

that the record as a whole adequately supports most of the findings and conclusions entered by the ALJ.[77] In this opinion, the Commission has noted where it has modified the specific findings of fact entered by the ALJ. (*See, e.g.,* Appendix A)[78] The Commission affirms the ALJ's conclusion that complaint counsel have met their burden of proof in this matter and we accordingly reject Horizon's defense.

B. Written Disclosure Documents

Horizon defends against this action by asserting that it disseminated to customers various documents, chiefly a federally required property report, which disclosed material information concerning the customer's purchase. Horizon argues that in reaching his conclusion of liability, the ALJ only considered evidence of verbal representations made to consumers. Respondent's appeal brief states that it "is patently unfair to reach conclusions on the net impression of a sales presentation unless a customer's recollection is placed in the context of the entire presentation—both written and oral." (RAB 14) **[73]**

Horizon's position assumes that Horizon itself gave equal weight to verbal and written representations in its sales program. However, if the Commission finds that Horizon's verbal presentation so overpowered its written disclosures to the extent of rendering the latter ineffective, then the Commission must reject Horizon's defense. (*See Raymond Lee Organization,* 92 F.T.C. 489 (1978)) Complaint Count XXII alleges that Horizon distributed its disclosure documents "under such circumstances that it is likely that many purchasers will not read such documents. . .". Count XXII charges that Horizon's obtaining substantial financial commitments from consumers under these circumstances independently constitutes an unfair or deceptive act or practice. For the reasons below, the Commission rejects Horizon's defense and concurs in the ALJ's affirmance of complaint Count XXII. (I.D.pp. 270–272; *see* I.D. 77)

The Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C.

[77] Respondent objects to the weight the ALJ assigned to testimony of its witnesses, whom the ALJ deemed were less credible than complaint counsel's witnesses. (I.D.pp. 272–75) However, it is the ALJ, as trier of the facts, who has lived with the case, and who has had the opportunity to closely scrutinize witnesses' overall demeanor and to judge their credibility. Accordingly, absent a clear abuse of discretion, the Commission will not disturb on appeal the ALJ's conclusions as to credibility. (*See Lenox, Inc.*, 73 F.T.C. 578, 604 (1968), *aff'd*, 417 F.2d 126 (2d Cir. 1969)) The Commission finds no evidence of abuse of discretion in this case which would lead it to disturb the ALJ's conclusions concerning the credibility of Horizon's witnesses, except where specifically noted in our modifications of the ALJ's findings of fact. (*See* this opinion and Appendix A)

[78] The preponderance of the record evidence supports the Commission's finding that respondent marketed its properties as excellent, risk-free, short-term investments. This finding describes the net impression of respondent's marketing theme. When finding a specific net impression "the entire mosaic should be viewed rather than each tile separately." *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2nd Cir. 1963).

1701–1720 (1979), requires land sales companies to deliver to each of its customers a federal property report, intended to disclose material information. Although ILSFDA contains no instruction detailing methods of delivering the property report, the Office of Interstate Land Sales Registration (OILSR), which is charged with administering ILSFDA, has promulgated the following regulation:

. . . [T]he following practices shall be deemed to be a violation of the Act.

. . .

(b) Giving the property report to a purchaser along with other materials when this is done in such a manner as to conceal the property report from the purchaser. 24 C.F.R. 1715.25(b) (1980).

The record evidence reveals that sales representatives treated the property reports in three different ways during sales presentations: either the reports were given a cursory examination, or following the signing of a contract they were left with the customer with their importance unemphasized, or else they were used during the sales presentation to indicate federal government approval of Horizon properties. (*See generally,* I.D. 77) CX 157 is representative of a number of training manuals introduced into evidence. The manual instructs the representative to remove the property report from the representative's briefcase, at an appropriate moment in the presentation, and to briefly inform the prospect of the type of information the report contains. The representative is next instructed to "replace sample in briefcase." **[74]**(CX 157f) Although the property report would then be left with the customer if he or she made a purchase, the customer rarely appreciated the importance of the report's information due to Horizon's overwhelming verbal assurances. Sales representatives testified that consumers were not encouraged to read property reports during a sales presentation, because if customers were reading reports they were not listening to the sales pitch. (*See, e.g.,* Doyle, Tr. 4627–28; Dmitry, Tr. 16108) Consumers testified that due to the nature of the presentations they did not realize the importance of the property reports, and they did not read them. (I.D. 77) The ALJ concluded that the "significance of the federal property reports was not communicated to customers, that actual delivery of the reports was designed to gloss over its importance as a disclosure instrument, and that customers did not read the reports." (I.D.p. 271)[79]

In addition, one former sales representative testified that he was

[79] The ALJ, at I.D.pp. 270–71, reviewed Horizon's other supposed disclosure documents, including Sydney Nelson's "Principals of Land Ownership" (*see, supra,* discussion at 16–17) and statements contained in certain contract documents and on Horizon's TBA maps. Like the property reports, the record supports the conclusion that

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trained to represent that the property report "actually was an endorsement by the federal government. An endorsement . . . that what we say in there has been checked and looked at and approved by the federal government as being true as stated." (Hillman, Tr. 4740–41)

In upholding the ALJ's conclusion that the federal property report was delivered to purchasers in a manner calculated to conceal the importance of the disclosures it contained, the Commission does not address the question of whether Horizon complied with OILSR regulations. As we note, in our discussion of jurisdiction, *infra,* OILSR and the Commission share complementary jurisdiction over marketing practices in the land sales industry. It is the Commission's function to appraise the net impression of respondent's marketing scheme, and to determine the effectiveness, in a specific factual setting, of required or voluntary disclosures. **[75]**

In the context of Horizon's numerous verbal misrepresentations, highlighted throughout this opinion, written disclosures could not easily have overcome consumers' net impression of excellent, risk-free, short-term investments. We find that the manner in which Horizon delivered its disclosure documents was designed to obscure their importance, and thus rendered the documents ineffective as disclosure instruments. Therefore, we reject Horizon's defense that such documents cured any deception which might have occurred. In addition, we affirm complaint Count XXII to the extent that Horizon used the property reports to indicate federal government approval of its properties, and we hold that such a practice is deceptive under Section 5.

C. Representations of Sales Representatives

Horizon argues that it is not liable for any unfair or deceptive acts or practices of its sales force because: (1) Horizon was generally unaware of such acts or practices; (2) when Horizon became aware of such acts or practices the sales representative was either deprived of his or her commission or was fired; and (3) Horizon's sales representatives were not clothed with apparent authority. (RAB 54)

As our discussion indicates, *supra,* pages 17–18, the Commission is unconvinced that Horizon management was unaware of the manner in which its sales force marketed its property. In addition, the Commission agrees with the ALJ's reasoning that dismissal of a representative who violated company policy does not relieve Horizon

these documents were delivered in such a manner as to distract the consumer's attention from the disclosures they contained.

of liability. (*See* I.D.p. 290; *see, also, Standard Distributors, Inc. v. FTC,* 211 F.2d 7, 13 (2d. Cir. 1954)). Lastly, we agree with the ALJ that Horizon "clothed its sales representatives with apparent authority in the form of contracts, TBA maps, unit maps, property reports, films, [and] presentation manuals . . ., [and as such Horizon] is responsible for their sales representations even if unauthorized. *Goodman v. FTC,* 244 F.2d 584 (9th Cir. 1957)." (I.D.p. 290)

D. Laches and Equitable Estoppel.

The Commission affirms the ALJ's conclusion that neither laches nor equitable estoppel is a defense to an action brought by the government in the public interest. *Utah Power & Light Co. v. United States,* 243 U.S. 389, 408–9 (1917); *Times Picayune Publishing Co. v. United States,* 345 U.S. 594, 623–24 (1953); *United States v. Firestone Tire & Rubber Co.,* 374 F. Supp. 431, 433 (N.D. Ohio 1974). **[76]**

VI. JURISDICTION

Respondent contends that the Commission lacks jurisdiction over this matter because Congress gave the Department of Housing and Urban Development (HUD) exclusive jurisdiction over every facet of the land sales industry when it enacted the Interstate Land Sales and Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.* (1979). Respondent argues that the pervasiveness of the Act and its implementing regulations, 24 C.F.R. 1700 *et seq.* (1979), and the fact that those laws grant HUD power over fraudulent sales practices, indicate that Congress intended HUD's Office of Interstate Land Sales Regulation (OILSR) to be the exclusive regulator of interstate land sales. Respondent further argues that regulation and review of land sales practices by both OILSR and the FTC would produce conflicting standards of conduct for the sales industry. Finally, it contends that the Initial Decision usurps OILSR jurisdiction by finding that compliance with OILSR regulations constitutes an unfair business practice. (RAB 51)

We reject respondent's arguments for the following reasons. First, ILSFDA does not expressly grant OILSR exclusive jurisdiction over fraudulent land transactions. Second, neither the language of the statute nor the legislative history supports implied repeal of Section 5 of the FTC Act with respect to interstate land sales practices. Third, regulation under ILSFDA and the FTC Act do not pose the threat of conflicting regulatory standards. Finally, we conclude that

the FTC and OILSR serve complementary but not coterminous regulatory roles.

To support its contention that Congress' enactment of ILSFDA granted exclusive jurisdiction over unfair and deceptive practices in the sale of land to OILSR, respondent must demonstrate that Commission jurisdiction under Section 5 has been either expressly or impliedly repealed. *See generally, United States v. National Association of Securities Dealers, Inc. (NASD),* 422 U.S. 694 (1975).

Respondent has failed to identify any express grant of exclusive jurisdiction in ILSFDA. Our own review of the statute indicates that no such express repeal exists. Accordingly, respondent must rely on the doctrine of implied repeal.

The Supreme Court has long held that it is "a cardinal principal of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.,* 425 U.S. 164, 168 (1976); *see also, Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 155 (1976); *Gordon v. New York Stock Exchange,* [77]422 U.S. 659, 682 (1975). Therefore, the proponent carries a heavy burden to show that it was Congress' "clear and manifest" intention that the statute in question was to be repealed. *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936). In determining whether a statute has been impliedly repealed a court will first scrutinize the plain language of the allegedly preemptive statute, and then, if necessary, look to the legislative history. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 184–185 (1978). If a Congressional intention to repeal is not evident from either of these sources, the two statutes in question must be in irreconcilable conflict, or the later act must have been "clearly intended as a substitute" before a court will apply the doctrine of implied repeal. *Posadas,* 296 U.S. at 503; *see also, NASD,* 422 U.S. at 719–20; thus, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963); *see, also, Gordon,* 422 U.S. at 685 (1975).

On its face, ILSFDA contains no language or provisions that could be interpreted as an expression of Congressional intent to grant OILSR exclusive jurisdiction over interstate land sales practices or to limit other agencies' authority in that area. On the contrary, Section 1713 of ILSFDA explicitly provides that alternative avenues of legal recourse are retained despite the passage of the special legislation directed at land sales transactions. That section states that "[t]he rights and remedies provided by this chapter shall be *in addition to any and all* rights and remedies that may exist at law or in equity." (emphasis added) 15 U.S.C. 1713 (1979). An example of a

legal remedy not available under ILSFDA is the Commission's broad redress authority under Section 19 of the FTC Act, 15 U.S.C. 57b (1976).

The fact that some of ILSFDA's provisions give OILSR review authority which is similar to the authority exercised by the FTC under Section 5 cannot be read as an expression of Congressional intent to grant exclusive jurisdiction. The FTC shares authority over various advertising and sales practices with several other agencies including the Consumer Product Safety Commission, the Food and Drug Administration and the Justice Department. Yet, despite these instances of overlapping agency authority, the FTC can be and is considered the agency with the foremost enforcement authority and expertise in the area of unfair and deceptive trade practices.[80] [78]

The legislative history of ILSFDA indicates that Congress was aware of the involvement of other agencies, including the FTC, in reviewing interstate land sales practices at the time the Act was adopted and during the course of its many amendments but did not choose to include an express or implied exclusivity provision in the Act.[81] The legislative history further indicates that Congress anticipated a system of dual jurisdiction over the land sales industry. The most explicit statements of this intention are contained in the 1978 House and Senate hearings on proposed amendments to ILSFDA.

During the 1978 hearings of the House Subcommittee on Housing and Community Development, the dual jurisdiction over deceptive and unfair advertising between the FTC and OILSR was directly discussed. Various passages of testimony reveal that in 1978 the Committee members assumed the existence of concurrent jurisdiction. Typical of these remarks is a question by the Subcommittee Chairman to an FTC representative:

Chairman Ashley. Mr. Steinman, since most consumer complaints regarding land

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[80] *See, e.g., FTC v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972).

[81] *See, e.g., Interstate Land Sales Full Disclosure Act: Hearings on S. 2672 Before A Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2nd Sess. 307–308 (1966) (Letter of FTC Chairman Paul Rand Dixon); *Oversight of the Interstate Land Sales Full Disclosure Act: Hearings on H.R. 10999 Before the Subcomm. on General Oversight and Renegotiatton of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess. 350 (1978) (testimony of Bureau of Consumer Protection, FTC); *The Interstate Land Sales Full Disclosure Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development, of the House Comm. on Banking Finance and Urban Affairs*, 95th Cong., 2nd Sess. 566–567 (1978) (testimony of Bureau of Consumer Protection, FTC); *Interstate Land Sales Program: Hearings on S. 2716 Before the Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess. 38–39 (1978).

Congress has included exclusivity provisions when it intended to limit jurisdiction over a particular subject matter to one or a few agencies. *See, e.g., United States v. Philadelphia National Bank*, 374 U.S. 321, 350 n. 27 (1962).

Such provisions have been included by Congress when it was aware of and wanted to avoid the potential for conflict between agencies having dual jurisdiction. *See, e.g., Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 130, (1974); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178–188 (1978).

sales appear to involve deceptive marketing practices, would it make sense to consolidate enforcement for fraud in the FTC *instead of maintaining the dual jurisdiction involving both the FTC and HUD?* (emphasis added) *The Interstate Land Sales Full Disclosure* **[79]***Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 95th Cong., 2nd Sess. 669 (1978).[82]

The fact that Congress envisioned a system of concurrent jurisdiction is most clearly stated in the House Report that accompanied the 1979 amendments.[83] When discussing the new provision for a biennial report from OILSR to Congress, the House Committee stated:

Often improved industry practices, unanticipated trends in consumer problems and *new remedies devised by other agencies who also review the land sales industry* will suggest needed amendments to existing law. (emphasis added) H.R. Rep. No. 96–154, 96th Cong., 1st Sess. 40–41 *reprinted in* [1979] U.S. Code Cong. & Ad. News 2346, 2356.

Therefore, we conclude that Congress not only was aware of FTC activity in the land sales area, including the instant suit against respondent,[84] but also that it intended a system of overlapping jurisdiction.

Respondent argues that concurrent jurisdiction will subject land developers to conflicting regulatory standards, citing as an example the ALJ's finding that Horizon complied with OILSR regulations and yet violated Section 5. (RAB 51) However, **[80]**as our discussion above indicates, the Commission finds that although Horizon disclosed in its property reports the information required by OILSR, these disclosures did not ameliorate the deceptive misrepresentations through which it marketed its land. Compliance with OILSR's requirements cannot be construed as immunizing a company's overall sales techniques from scrutiny under Section 5. The OILSR regulations are meant to be preventive safeguards against improper sales tactics. Situations will exist, as in the instant case, where the overall sales plan is such that consumer injury results despite technical compliance with OILSR requirements. Thus, the issue is not whether compliance with an OILSR regulation constitutes an unfair business practice but rather whether respondent's sales

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[82] *See, also, The Interstate Land Sales Full Disclosure Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 95th Cong., 2nd Sess., 112–113 (1978) (remarks of Chairman Ashley); *Id.* at 73 (remarks of Rep. Brown); *Id.* at 55–56, 73 (remarks of Rep. Minish); *Id.* at 550 (testimony of Patricia Worthy, Administrator of OILSR); *Id.* at 73 (remarks of Rep. Brown); *Id.* at 112 (testimony of Patricia Hynes, Assistant U.S. Attorney, Southern District of New York).

[83] The House Report was adopted by the Conference Committee. [1979] U.S. Code Cong. & AD. News 2346, 2346.

[84] *Interstate Land Sales Program: Hearings on S. 2716 Before the Senate Committee on Banking, Housing and Urban Affairs,* 95th Cong., 2nd Sess. 35 (1978) (testimony of the Bureau of Consumer Protection, FTC).

practices, taken as a whole, have negated the preventive utility of technical compliance with OILSR requirements.[85]

We conclude that regulation of fraudulent land sales practices under both ILSFDA and Section 5 is a complementary but not coterminous process. Review of land transactions is complementary because the ultimate regulatory goal—protection of consumers from fraudulent business practices—is the same under both statutes. Yet, the scope of each agency's review authority and its ability to rectify abusive practices are vastly different. Therefore, repeal of Section 5 as to the land sales industry is not necessary for ILSFDA to work as intended. *Gordon,* 422 U.S. at 685; *Silver,* 373 U.S. at 357.

For the foregoing reasons we reject respondent's contention that the Commission does not have jurisdiction over the instant case. **[81]**

VII. ORDER TO CEASE AND DESIST

The order to cease and desist entered by the Commission in this case is substantially similar to the order recommended by the parties. The Commission believes that this order, taken as a whole, adequately addresses the violations of Section 5 committed by Horizon and provides a basis for resolving this matter without the delay and uncertainty of entry of a cease and desist order, followed by appellate review and a separate Section 19 redress action in federal district court.[86] However, the Commission will not necessarily view this remedial scheme as a model for relief in future land sales cases.

The order requires payment of $14.5 million in redress over a six year period to past purchasers of Horizon land. It also requires Horizon to ensure that it, or some other entity, spends $45 million over a 20-year period for improvements at any of the six Horizon properties which were the subject of this proceeding. The order enjoins Horizon from committing unfair or deceptive acts or practices and contains affirmative requirements designed to eliminate further violations of Section 5. The prospective relief contained in the order differs depending on whether the land sold is "developed" or "undeveloped", as those terms are defined in the order's preamble; sales of "developed" land (Sections I–III) are treated less

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[85] As we mentioned above, OILSR recognizes the possibility of this kind of situation:

> . . . (T)he following practices shall be deemed to be a violation of the Act.
>
> . . . .
>
> (b) Giving the property report to a purchaser along with other materials when this is done in such a manner as to conceal the property report from the purchaser. 24 C.F.R. 1715.25(b) (1980).

[86] Additional litigation in pursuit of further monetary relief for purchasers of Horizon land would apparently be fruitless in light of the limited assets available to respondent. (*See* supplemental briefs filed by the parties on May 8, 1981)

stringently than sales of "undeveloped" land (Sections IV–VI). The Commission believes that this different treatment is justified by the record, which primarily concerned sales of undeveloped land.

Appendix A*

MODIFICATIONS OF THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION, IN THE MATTER OF HORIZON CORPORATION, DOCKET NO. 9017

Note: These modifications are in addition to those noted in the Commission's opinion.

Page	Line	Addition or Deletion
493	1	Add footnote "None of the findings of fact 1 to 23 applies to the time period after October 10, 1978, unless otherwise indicated herein."
493	22	Change to read: "Horizon as of the date the record in this proceeding closed and for some time past had been engaged . . ."
495	18	Delete: "the balance has been or will become available for sale" and insert: "it is uncertain whether all or any part of the balance will become available for sale to consumers."
502	34	Insert footnote to read: "TBA maps* . . ." Footnote placed at bottom of page 502 should read: "* A TBA map depicted an entire property and the surrounding area and included certain information relating thereto."
504	9	Change period to comma at the end of the sentence and add the following phrase: "but were challenged primarily on the grounds that they contained deceptive and misleading statements and representations."
504	37	Delete the word "requirements" and place in lieu thereof the word guidelines.
504	40	Delete the sentence beginning, "The evidence of record" and add the following sentence in lieu thereof: "OILSR never brought any proceeding seeking to enforce those guidelines against Horizon."
505	23	Delete the words "recent years" and insert in lieu thereof, "1973 and 1974"
506	39	Delete the phrase "and early 70's"

* A number of typographical errors contained herein were corrected during the editing of the document and, thus, may not be found within the text as indicated.

507	2	Before the sentence beginning "Invitations . . ." insert this sentence: "This sales method was deemphasized and ultimately terminated in the early 70's."
507 & 508	39–41 & 1	Delete this sentence and citations thereto: "While . . . 16543–44)."
508	18–20	Delete this sentence beginning: "Jing Jo Yu . . . closing rooms (Tr. 6353–60)."
508	18	After "16480" insert from lines 20-22: "; see testimony of Elsie Colon . . ." plus citations thereto
512	5 & 6	Delete "that permeated"
512	5	Insert "in" after "theme"
512	7	Delete "promise" and insert "representation" in lieu thereof
512	8	Delete "constant"
512	28	After "Tr. 1918" insert "; see also Tr. 1922–23"
512	30–38	Delete these lines
513	1 & 2	Delete these lines
515	21	Change "tract" to "track"
517	11	Insert "in late 1969" between the words "used" and "in"
518	9	Change "would" to "could"
521	23	Insert "in the late 1960's and early 1970's" between "presentations" and "used"
523	29	Delete "numerous" and insert "some" in lieu thereof
524	13 & 14	Delete both of these lines and insert in lieu thereof: "One sales representative testified that he was given the following party close for use at the conclusion of the dinner talk:"
524	38–40	Delete "These . . . investment." and insert "(CX 505–15)" after "properties" on line 38.
525	9	Insert "some of" between the words "by" and "Horizon"
525	10	Delete the words "Land is" and insert in lieu thereof "These salesmen"
525	11	Insert "land" between "represented" and "to"
525	12	Insert "by them" between "represented" and "as".
526	21	Insert "During the late 1960's and early 1970's many" before "sales"
527	19	Insert "some" between "which" and "sales"

527	20	Delete the "s" on "representatives"
527	27	Delete the last "s" in "representatives"
527	34	Delete "Horizon's internal surveys of its sales offices revealed" and add "There were" in lieu thereof
528	9–14	Delete the sentences beginning "One sales representative told prospects. . . . There were no figures. (Tr. 5970)."
528	23	Add "s" to make "value" plural
528	23–24	Delete "was to raise the inference" and insert in lieu thereof "inferred"
528	37	Add new sentence: "The FHA charts were deemphasized in 1972 and eliminated in 1974."
528	38	Delete "Horizon's internal survey of its sales offices revealed" and add "There were" in lieu thereof
529	25	Delete the word "entire"
530	33	Delete the word "greatly"
530	34	Delete the word "grossly"
531	2	Delete the word "percentage" and insert in lieu thereof "range"
531	2	Delete the word "would" and insert in lieu thereof "might"
531	12	Delete "would assure" and insert in lieu thereof "should lead to"
531	20	Insert "some" before the word "sales"
531	20 & 21	Insert the word "approximate" between "the" and "time"
531	22–26	Delete five lines beginning "Bruce . . . representatives:"
531	22	Insert after sentence ending on line 22: "These representatives did not present:"
531	27	Change "The" to the lower case "the"
531	27	Delete "is not presented to the customer"
531	29	Delete "But"
531	29	Begin sentence: "Rather, . . ."
531	29	Delete "it is" and insert "they" in lieu thereof
531	29	Insert "development" after "with"
531	29	Delete "assured"

531	30	Change "the" to "them", add period after "them" and delete "representative (CX 929E)."
531	33	Add an "s" to "reveal" and delete "beyond any doubt"
531	38	Insert "Some" before "Training"
532	5	Begin paragraph with: "During 1970–1971 such instructions or directions were included in the training manuals. In addition to the written instructions, there were oral restrictions and limitations given to sales representatives. Such instructions did not eliminate the investment misrepresentations."
532	28	Change "would" to "could"
532	34	Delete the word "thereafter" and insert "1971" in lieu thereof
534	37	Correct the misspelling of "antedates"
538	23–28	Delete the whole paragraph and insert in its place: "Some sales representatives used the 'Principles' in their presentations. Other representatives did not use them. They often were not read or understood by customers."
540	13	Delete the word "clearly"
540	13	Insert the word "some" between the words "that" and "sales"
543	3–9	Delete whole paragraph
543 & 544	39–6	Delete lines 39–41 and 1–6.
544	17	Delete the words "very very"
544	18	Delete the words "very much".
545	33–35	Delete the line: "Horizon's 'self-evaluative' documents, which report on surveys of sales offices which Horizon undertook beginning in 1973, revealed that"
545	35	Begin paragraph with "Representations . . ."
545	35	Delete the word "routinely"
545	37 & 38	Delete the sentence: "These representations are set out in detail in findings 91–100, see especially CX 927L–M,O,"
545	40 & 41	Delete: "These internal survey reports reveal that"
545	37 & 38	Insert and place in parentheses citations after "mentioned", line 37
545	41	Insert the word "some" before the word "older"
546	1	Delete: "Findings 91–100; see especially"
546	2	Insert hyphen in "CX 927G–I"

546	2	Add the sentence: "Some sales representatives used time periods as short as three to five years before the land could be resold at a profit. The shortest time periods were for lots close to the development areas (CX 927L–M)."
546	3	Delete: "The survey documents reveal that it was routine"
546	3	Insert: "Another" before "practice" and "was" after "practice"
546	6	Delete the word "much"
546	7	Delete "(Findings 91–100; especially"
546	9–14	Delete the whole paragraph
546	30 & 31	Delete: "Horizon's internal surveys of its sales offices revealed that"
546	31	Capitalize "The"
546	32	Delete "serious"
546	33	Delete "(Finding 93; see especially"
546	34–36	Delete the whole paragraph
546	38	Insert the sentence: "Some, but not all, of these customers did receive refunds" after "misrepresentations"
546	38–42	Delete lines 38–42 beginning with "On April 12, 1972"
547	1–12	Delete these lines
547	14	Insert "some" after "that"
548	23	Change "would" to "could"
548	24	Insert the sentence: "Other Waterwood customers purchased on the basis of profit and development potential in periods up to ten years (CX 930 C, G, 932F)."
549	4	Change "would" to "could"
549	25	Delete "and utilities would be provided"
552	30–35	Delete last full paragraph at bottom of page
554	4–10	Delete these lines
555	3	Add the sentence: "A limited resale program was instituted in Horizon City in 1975 for deeded lots and in Waterwood in 1976 for deeded and undeeded lots."

556	5–8	Delete "J.D. Oliver and A.R. Oliver were informed by the Horizon sales representative that the Waterwood lots that they purchased would be resold by the sales representative or by Horizon. (Tr. 976–78, 1037–38, 1090–91)."
557	2	Add, within the parenthetical citation: "; see also, CX 951G, H)"
557	18	Insert after "Tr. 4902": "; see also CX 927N)."
557	31–41	Delete these lines
558	42	Delete text beginning "Mr. Gothard."
559	1–5	Delete text beginning "by Bruce Lehmann" to "(Tr. 6100)."
560	4	Delete "-82)" and insert "-86, 16288)."
560	5–15	Delete this paragraph
560	16–20	Delete these lines, but keep sentence beginning "Evelyn Tracy . . ."
560	24	Delete: "Horizon's internal surveys of its sales offices found" and insert "In" in lieu thereof, before "several"
560	25	Delete the word "where"
560	27	Delete the word "outright"
560	30	Insert "; see also Tr. 16673, 16691–696, 16676, 16679" after "950E, G"
560	30	Add sentence: "Customers believed that Horizon's price for its land reflected a fair local real estate market price for which they might resell their land (CX 946H)."
562	16	Add after the last sentence: "Statements approved by the company were not considered a basis for refunds"
564	21 & 22	Delete "apparently as late as 1977" and add citations in line 22 to citations in line 21
564	23	After "Commission's" insert "investigation began"
564	23	Delete "complaint herein issued"
567	17	Insert "some" in lieu of "Horizon's internal surveys of its sales offices found evidence that"
567	26	Add ", CX 951G, H" after "Tr. 16478–80"
567	29	Insert "some" before "customers"
567	33	Insert "some" before "customers"
568	23	Add the word "not" between the words "that" and "all" and delete the word "not" between "were" and "staked."

568	29	After the word "he", insert the word "scheduled" and delete the word "controlled"
568	30	Add "s" to "tour" and delete the word "schedules"
573	29-32	Delete these lines
573	33-35	Delete these lines
575	13–17	Delete these lines
575	25	Insert the sentence: "It was the customer's choice to visit by jeep or by airplane" before the sentence beginning "This sale . . ."
577	36	End paragraph by inserting sentence: "She did not receive a refund because the sales representative did not believe that a misrepresentation had been made."
579	7 & 8	Delete sentence beginning "Horizon headquarters"
579	8	Delete "In April, 1973"
579	8	Add "During 1973 and 1974" before "Horizon mailed"
579	25–27	Delete: "The general practice, however, was not to give customers the appreciated value on their trade-ins (Tr. 3941, 4612–13)."
580	20	Insert "some" before the word "sales" and change the upper case "S" to lower case.
580	24	Delete this line
580	25	Capitalize the "R" in "reloading"; delete "the" after "in" and insert "some" in lieu thereof. Change the semi-colon after "offices" to a comma; delete "reloading" and insert "where it" in lieu thereof
580	27	Delete "These surveys showed that" and insert "some" in lieu thereof
580	31	Insert "C," between "929" and "D"
580	31 & 32	Delete: "The surveys also revealed" and insert "In some"; also delete "where"
580	36	Start sentence with "There were" and delete "The surveys"; delete "noted"
580	40	Insert "Some" before "sales"
581	38	At the end of line 38, add: "The University later conducted a few classes in the Rio Community shopping center offices."
582	16 & 17	Delete the phrase: ", employed by Horizon from 1968 until 1974 (Tr. 1904)" and after "trained" insert "in 1968"
582	29	Insert "Some" before the word "sales"

582	36	Insert "Some" before the word "customers"
583	1	Change "would" to "could"
583	30–41	Delete these lines
584	1	Delete this line
584	29	Change "would" to "could"
584	40	Insert "possible" in front of "three-way"
585	33–35	Delete these lines
585	36–43	Delete these lines
586	12 & 13	Delete: "Horizon's internal surveys of its sales offices reveal extensive" and insert "There was"
587	3–10	Delete first full paragraph
587	38 & 39	Delete the last sentence: "There is other evidence of pressure on customers to purchase immediately."
589	9	Delete "each" and insert "one" in lieu thereof
589	24 & 25	Delete "(Tr. 4946)"
589	26 & 27	Delete these lines and insert ellipsis before "being sold"
589	28	Insert "4946," before "4966"
590	18	Add new paragraph between paragraph ending on line 18 and paragraph beginning on line 19: "Numerous lots were typically available for sale in a particular unit or subdivision. One or more lots in a given unit or subdivision would generally be allocated to a particular salesman or to several salesmen. Allocations of unsold lots were occasionally shifted among salesmen or from one sales office to another. The sales representative called Horizon before finalizing a sale to find out whether a given lot had already been sold and to remove the lot from inventory if it were sold."
590	19	After "period" insert "in either 1970 or 1971"
590	32	Add this sentence: "No other witness testified to the use of this preplanned call approach."
591–592	38–2	Delete paragraph beginning "Joan Wild . . ."
592	31–36	Delete the first two sentences from this paragraph
593	16	Insert "There were" in place of "Horizon's internal surveys of its sales offices revealed"
595	19–28	Delete these lines
595 & 596	29–43 & 1–2	Delete these lines except for citations; insert "; see also Tr. 16430, 16506, 2111–14, 2126, 2169, 4687, 4733–35)." after "5053–54" at end of line 18

596	5	Insert "2011–12, 2113–14" after "Tr."
596	29–42	Delete these lines
597	1–2	Delete these lines
603	22	Insert "many" in place of "almost all"
604	4	Insert "some salesmen" in place of "it is"
604	4	Insert "or mainly" after "only"
604	5	Insert "Other sales representatives indicated that the Southeast was one of El Paso's major growth directions."
611	23	Delete "sales representatives and"
613	10–16	Delete this paragraph
617	31	Insert "offered rebuttal evidence" in place of "employees testified"
618	4	Insert after "Tr.": "915, 1503,"
618	7–37	Last sentence of first full paragraph and rest of page should be deleted
619	1–2	Delete these lines
619	3	First full paragraph should start "Many customers testified"
619	3	Delete "all"
635	16	Change "Wesley Roark" to "Wayne Roach"
637	12	Delete "grossly"
637	13–14	Delete "to continue" and add comma after "fund"
637	14	Add the phrase after "fund": "unless such fact is disclosed clearly and conspicuously"
640	31	Last paragraph, insert "some" after "that"
641	11–14	Delete first sentence
641	22–24	Delete sentence starting with "Joan Wild", including citations
641	33–43	Delete these lines
642	19–25	Delete this paragraph
644	7–9	Delete this paragraph
644	33	Insert "all" before "purchasers"
644	34	Insert "all" before "customers"
644	35	Delete "they" and insert "some" before "were"

345-554 O—82——56

644	41	Delete words "which can be used" and insert in lieu thereof: "which has no significant impediments, such as easements, to the use of the entire lot"
645	2–5	Delete these lines, starting with "There is"
645	6	Delete: "There is no record evidence that"; and insert the words "failed to inform some" after "Horizon"; delete "informed any"
645	7	"Customer" should be plural
650	19	Add this citation at the end of the first full paragraph: "(See also Tr. 3519–21, 3729–30, 1291–93.)"
650	28–39	Delete these lines, beginning with "Mr. Rosenthal"
651	8	Delete heading
651	9–40	Delete these lines
652–665		Delete these pages
666	1–18	Delete these lines
671	19 & 20	Delete sentence starting "He noted" and ending with "(Tr. 6690–93)"
673	23–30	Delete these last eight lines starting with "This understanding"
673	23	Add the sentences: "The contractual exchange privilege for many lots expired when the lots were deeded to the customer. Horizon voluntarily honored some exchange requests after deeding them."
700	27	Add prefix "dis" to "similar"
703	5–7	Delete the words: "described the Horizon communities as 'bastard' cases because Horizon has shifted the financial burden of its developments to the lot purchasers (Tr. 16032–34). He"
706	19	Add: "The evidence on this contention was inconclusive."
719	7–11	Delete sentence beginning "However Horizon"
721	35	At the end of the paragraph add: "Some customers who forfeited made unsuccessful efforts to obtain refunds (*e.g.*, John Gothard, Tr. 6097–6100)."
723	13	Delete "Available evidence indicates that Horizon had"; capitalize "No" and after "public" (line 15) insert "were offered into evidence"
723	28	Delete "there were" and insert "he had seen"
723	37	Delete heading
723	38–41	Delete these lines

724–725		Delete these pages
726	1–27	Delete these lines
726	29	Before "Horizon's" insert "Many of"
726	29	Delete the word "all" in the first line of finding 136
726	31	Delete "they" and insert "These lots" in lieu thereof
727	8	Delete "Leonard Steele testified that"
727	9	Begin the sentence with "Water"
727	10	Insert "ground" before "water"
727	11–14	Delete the sentence starting with "This will require" including citations
727	14	Add at end of the paragraph the sentences: "Therefore, it was never part of the development plan to use individual wells. Rather, the plan called for the use of company wells for which adequate fresh water existed as of the date of the hearing."
727	18–20	Delete the sentence after "CX, 10M" beginning with "This" and ending with "(Finding 85–86)."
728	14	Before "Horizon City" insert the words, "the most remote"
728	35–37	Delete the phrase, "but no money has been escrowed to assure completion of the roads and"; capitalize "There" to begin a new sentence and add this phrase after "roads": "but they have been maintained to date"
728	41	Add this paragraph after "(CX–10K)" "The cost of development and of assessment were not adequately disclosed to some customers (CX 932F; 950J)."
729	9	Delete "Average price per acre $53.78"
730	4	Delete the zero in the third column
730	9	Delete "$133.45" in the third column
730	29	Delete the phrase "Average price per acre $148.00"

Final Order

This matter has been heard by the Commission upon the appeal of counsel for respondents and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. The Commission, for the reasons stated in the accompanying Opinion, has granted each appeal in part and denied each in part. Therefore,

It is ordered, That the initial decision of the administrative law

judge be adopted as the Findings of Fact and Conclusions of Law of the Commission except as otherwise inconsistent with the attached opinion (including Appendix A).

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist be entered:

Order

PREAMBLE

1. For purposes of this Order the following definitions shall apply:

Horizon Corporation or *respondent* shall mean the corporate respondent, its successors and assigns, its officers, directors, agents, representatives and employees, directly or through any corporate subsidiary, division, or other device.

Purchase price and *cash price* shall be defined as cash price is defined in the Truth-in-Lending Act's implementing Regulation Z (12 C.F.R. 226.2(n)).

Lots or *land* shall include all subdivided parcels of land sold or offered for sale by respondent.

Subdivision shall mean any land (located in any state) which is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale as part of a common promotional plan, such as the plan used by respondent in marketing the properties involved in this proceeding. One indicator of a common promotional plan is the use of standard form contracts in the context of large scale merchandising of small lots to persons who typically do not see the land at the time of purchase. *Provided, however,* That, *lots* or *land* shall not include: **[2]**

a. The offer or sale of lots in a subdivision containing fewer than twenty-five lots.

b. The offer or sale of any lot upon which a residential or commercial structure is located.

c. The offer or sale of any lot together with or under a contract with respondent or a builder to construct a house or other building thereon within twenty-four (24) months.

d. The offer or sale of lots for which the total purchase price in any single transaction is more than $50,000.00, or the cumulative size of the lot or lots sold in a single transaction is 100 acres or more.

e. The offer or sale of any lot or parcel to any person, partnership or corporation not affiliated with respondent where the land is not acquired for any personal, family or household purpose. *Personal, family or household purpose* shall include investments by individual consumers.

2. As used in this Order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting directly or by implication, and by any manner or means. [3]

3. Sections IV, V and VI of this Order shall not apply to the sale and offer of sale by respondent of the following types of lots:

a. All lots which at the time of sale are accessible by paved road and to which electric, water and sewer lines have been installed to the lot line.

b. All lots which at the time of sale are accessible by paved road and to which electric and water lines have been installed to the lot line, and where a septic tank can be installed at a cost not to exceed the normal installation cost ordinary to the locale in which the lot is located and where such a septic tank is permitted by laws or ordinances in effect as of the date of sale.

c. All lots for which Horizon or any other bona fide entity is obligated by contract, covenant, indenture, charter, statute or ordinance to provide, or has provided, paved access, and electric, water and sewer lines to the lot line.

d. All lots to which access over maintained roads and electric lines to the lot line are already in place or are the obligation of Horizon or any other entity, and water and sewage disposal are available from a central water system or a well and septic tank at costs not to exceed the normal installation costs ordinary to the locale in which the lot is located, [4]and where such well and septic tank are permitted by law or ordinances in effect as of the date of sale.

e. All lots which would otherwise qualify under paragraphs a, b, c, or d, above, except that an electric line is not installed to the lot line and no bona fide entity is obligated to provide an electric line extension if the lot is one acre or larger in size and an electric line extension is available from a utility company at a cost disclosed in the Cost Sheet provided pursuant to Section II. A herein.

4. Sections I, II, and III of this Order shall apply only to the sale and offer of sale by respondent of any lot or land qualifying under subparagraphs a, b, c, d or e above.

I.

It is ordered, That respondent Horizon Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, acting directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale or sale of lots or land as defined herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment, unless respondent can demonstrate that such is a fact and is not misleading. **[5]**

2. There is little or no financial risk involved in the purchase of respondent's land, unless respondent can demonstrate that such is a fact and is not misleading.

3. The resale of land purchased from respondent is not, or will not be difficult, unless respondent can demonstrate that such is a fact and is not misleading.

4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, unless such is a fact, and is not misleading, and unless respondent discloses clearly and conspicuously the current costs of such service and any material limitation on such service.

5. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise, unless such is a fact and not misleading.

6. Lots to which respondent has given one designation, such as "multi-family residential," "commercial," "acreage" or terms of similar import, have a significantly different present or expected value than lots with any other designation unless (i) such representation is true and is not misleading, (ii) respondent has a reasonable basis at the time of making such representation to believe that it is true, and (iii) respondent discloses clearly and conspicuously in immediate conjunction with the written use of any such designation other than **[6]**single family residential: A lot's designation as [specify designation, *e.g.* multi-family] may have no bearing on whether such use will occur.

7. The price set by respondent for the land is equivalent to the market value of such land, unless at the time of such representation

it is substantiated by adequate market data on sales and resales (including attempts to resell and listings for resale that are known or should be known by respondent) of similar land (land in a similar location with the same degree of development); *provided, however,* that if the data upon which the market value is determined does not include resales by individual purchasers, respondent shall clearly and conspicuously disclose both orally and in writing, that the seller's estimate of market value is not based on actual resales by individual purchasers.

8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money.

9. The demand for land offered for sale by respondent has increased, is increasing, or will increase, unless such is a fact and is not misleading.

10. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing, unless such is a fact and is not misleading. **[7]**

11. Purchasers must purchase immediately in order to insure that a particularly desirable location will be available at the same price in the foreseeable future, unless such representation is true and is not misleading.

12. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided,* that respondent may accurately recite the terms and conditions of the contract and of all refund privileges and cancellation rights, if applicable.

13. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

14. Any lot is located within a geographic area designated or described as "community," "town," "city," or by words or terms of similar import, unless respondent discloses in reasonable proximity therewith the approximate population of the community, town or city, its distance from the lot subject to the representation, and an accurate listing of some or all of the facilities located therein; *provided, however,* that such disclosures **[8]**need not be made where such representation is made on-site to a purchaser within the subdivision in which the lot is located; and *provided, further,* that

respondent shall not be obligated to rename any currently platted property or to make any such disclosures solely because of the use of the name of any such currently named property.

15. The purchase of land in general is a good, profitable, safe or sound investment.

B. Making any false or misleading reference to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in price, including reference by actual dollar amount, percentage increase, or by any other means, as indicative of market value, or of a change of market value.

2. The past or present population, employment or industrial statistics or trends or other statistics or trends in a geographic area.

3. The predicted future population, employment or industrial statistics or trends or other statistics or trends in a geographic area. For such future statistics or trends, such reference shall not be considered false if at the time such reference is made respondent has a reasonable basis for believing it to be an accurate prediction. [9]

4. The present, planned, proposed or potential development, improvement or facilities of the lot being offered or of the unit, subdivision or project in which the lot is located. An accurate statement shall not be considered misleading if it is clearly disclosed to the customer (a) whether the development or improvement will be undertaken by respondent or a third party, (b) when the development or improvement is likely to be undertaken, (c) whether the purchaser has any contractual or other interest in the development or improvement, and (d) any costs which may accrue to the customer other than those normally assessed for the use of a public facility.

5. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment.

6. The signing of a contract or any reservation by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to, any reference to any other person having a "hold" on a lot; *provided, however,* that respondent may refer to any bona fide sale or option on a lot for which it receives consideration.

7. Respondent's reputation, size, assets or listing on any stock exchange. It shall not be considered false or misleading for respondent to make such references [10]as are required by statute or regulation in the place and manner required by such statute or regulation, or for respondent to provide any purchaser or prospective

purchaser upon request with any document prepared in accordance with the rules of the Securities and Exchange Commission, the Department of Housing and Urban Development, or the Office of Interstate Land Sales Registration.

8. The present, planned, proposed or potential development of any land by anyone other than respondent.

9. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means:

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with a purchase decision or the purchase of respondent's land.

2. Failing to provide any required federal or state property report before the customer signs the contract; failing to recommend that the customer read the federal property report; interrupting or distracting any customer from reading a property report. [11]

3. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any material respect from the rights or obligations of the parties as stated in the contract of sale, or the property report.

4. Including language in any contract permitting the respondent to retain any sums paid by the purchaser in excess of the amount permitted to be retained by respondent under Part III F of this Order, upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract.

5. Failing to disclose, clearly and conspicuously, to each customer the existence, size, location, and nature of any and all easements and other physical features which could significantly affect the full use and enjoyment of the lot being offered for sale.

6. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours. [12]

II

It is further ordered, That respondent:

A. Provide each prospective purchaser of lots a copy of the "cost sheet" pursuant to regulations of the Office of Interstate Land Sales

Registration in effect as of January 1, 1981. Such cost sheet shall be properly filled out to disclose the estimated costs for the lot or parcel offered. If such regulations are revised to provide for increased disclosure of development cost information to the prospective purchaser, respondent shall comply with such revised regulations. If such regulations are revised to require less disclosure, respondent shall, notwithstanding such regulations, disclose all development cost information now required, unless such disclosure would violate the revised regulations. If necessary to comply with revised regulations, the format of the disclosure may be revised, *provided,* that any revised format must disclose the required information in a clear and conspicuous manner.

B. Include in all contracts of sale the following provision:

The contents of the federal property report are part of this contract. *Provided, however,* That where the property report provides an accurate and not misleading estimate of costs or description of current facilities it shall not be a breach of the contract should such estimate or description become inaccurate after the contract is effective. **[13]**

C. Include in all contracts executed from the date this Order becomes final until the final disbursement of the trust fund established in part VII of this Order the following provision:

In the event Horizon is unable to furnish the improvements to the Buyer's lot as described herein within six months of the promised date, unless such failure is caused by acts of God or other causes not under control of Horizon, Horizon shall, upon reconveyance of the lot in the same form and condition of title as conveyed to Buyer, offer the Buyer a choice of an exchange for an alternative lot or a refund of all principal and interest paid under this Contract or the Promissory Note and Deed of Trust, where applicable. If Horizon provides such exchange or refund, Horizon shall be released from any and all obligations under this contract at law or in equity.

Provided, however, Horizon may use any time period shorter than six months in such contractual clause.

D. Notify each purchaser within 30 days of any failure to provide, within six months of the promised date, any improvements to the purchaser's lot as required by the contract. **[14]**

III

It is further ordered, That:

A. Respondent shall include clearly and conspicuously in all contracts, promotional materials and printed advertisements the following statement:

The seller is not selling the lots in this subdivision as an investment. The future value of this land and your ability to resell it are uncertain. It is suggested that you discuss any possible purchase with a qualified professional.

B. Respondent shall include clearly and conspicuously in each contract for the sale of land the following statement in 12 point bold face type immediately preceding the space provided for the purchaser's signature; *provided, however,* that in the event that any state or federal law or regulation requires that another statement immediately precede the space provided for the purchaser's signature, the statement required herein may precede any such statement(s):

YOU HAVE THE RIGHT TO CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE YOU SIGN THIS CONTRACT.

IF YOU CANCEL WITHIN THIS TIME, WE WILL PROMPTLY REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT. [15]

TO CANCEL THIS CONTRACT, YOU MUST NOTIFY US WITHIN TEN BUSINESS DAYS AFTER YOU SIGN THE CONTRACT. NO SALES REPRESENTATIVE WILL CONTACT YOU DURING THESE TEN BUSINESS DAYS. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN 30 DAYS OF ITS OCCURRENCE, YOU WILL HAVE UP TO 180 DAYS FROM THE DATE OF PURCHASE TO CANCEL THIS CONTRACT.

WE RECOMMEND THAT BEFORE SIGNING YOU CAREFULLY EXAMINE THIS CONTRACT AND THE PROPERTY REPORT AND HAVE THEM REVIEWED BY A QUALIFIED PROFESSIONAL.

During this ten–business–day period after the signing of a land purchase contract, Horizon is forbidden to initiate any sales-related contact with the purchaser. Any such contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of 180 days from the date of purchase, but only if the customer notifies Horizon of the contact within thirty days after its occurrence. *Provided, however,* That it shall not be forbidden for a non-sales employee or representative of Horizon to contact a customer by telephone to ascertain if the property report was delivered, and to check the accuracy of the information on the contract. **[16]**

C. Respondent shall furnish each purchaser, at the time the purchaser signs a contract for the purchase of land, with the Purchaser Cancellation Notice required by regulation of the Office of Interstate Land Sales Registration as of January 1, 1981. In the event that such regulation is revised to disclose more information to the customer, to extend the length of the cancellation period, or

otherwise to increase the purchaser's rights, respondent shall comply with such amended regulation. Notwithstanding any revision to such regulation, respondent shall grant to the customer at the minimum the rights required by the regulation in effect on January 1, 1981.

D. Respondent shall honor any signed and timely notice of cancellation or its functional equivalent by the purchaser, and promptly after the receipt of such notice, (a) refund all payments made under the contract (b) cancel any contract or other legal document executed by the purchaser, and (c) provide the purchaser with written notice of such cancellation.

Whenever a timely notice of cancellation or its functional equivalent is received and said notice is not sufficient or proper in any manner, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser [17]of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth business day following the purchaser's receipt of the mailing, if the purchaser is to obtain a refund.

E. Whenever respondent sells property to a purchaser who has never seen the property before executing a contract for the purchase thereof, respondent shall extend a refund privilege conditioned upon the purchaser making a personal visit to the property within 180 days after the purchase and notifying respondent within ten business days after inspection that a refund is desired.

1. Respondent shall provide the purchaser with a copy of the following "Inspection and Refund Privilege Notice" at the time the contract is signed. The notice shall be a separate sheet of paper containing no other writing. The notice shall contain such of the bracketed language as is applicable. The notice shall be worded as follows:

INSPECTION AND REFUND PRIVILEGE NOTICE

Personal inspection of any land purchased is desirable. We recommend that you visit your property. If you visit your property within 180 days, you can cancel your contract for any reason within 10 days after your visit and get a full refund.

If you decide to inspect your land under the terms of the refund privilege, during the visit [18]the seller may encourage you to keep your land. The seller may also try to sell you more land, or have you trade for more expensive land. The seller [will or will not] reimburse you for your travel expenses [if you cancel your contract].

You should take time during your inspection to visit the local area and examine the real estate market where the property is located.

This inspection and refund provision is in addition to and does not take away your

rights to cancel within ten business days after you sign your contract. See your contract.

2. Respondent shall provide the purchaser ten business days after making the personal inspection within which to request a refund.

3. Respondent shall include in every contract, in immediate proximity to the provision setting forth the availability of this refund, the following statement:

IF YOU HAVE NOT PREVIOUSLY SEEN THE PROPERTY YOU HAVE UNTIL MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE CONCLUSION OF YOUR INSPECTION IN WHICH TO NOTIFY THE SELLER OF YOUR DECISION WHETHER TO CANCEL YOUR CONTRACT. NO SALES REPRESENTATIVE SHOULD CONTACT YOU ON BEHALF [19]OF THE SELLER DURING THIS TEN BUSINESS DAY PERIOD. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN TEN DAYS OF ITS OCCURRENCE, YOU WILL HAVE 30 DAYS FROM THE DATE OF YOUR VISIT TO CANCEL THIS CONTRACT.

4. Respondent will insure that every purchaser who seeks to view his or her lot can see and identify the lot specified in the contract; *provided, however,* that so long as the lot can be located by a stake at one corner or other definite land mark, it is not necessary that all four corners be marked.

5. Respondent shall furnish each purchaser at the conclusion of the inspection visit with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION" which shall contain in bold face type of a minimum size of 10 point, the following statement:

NOTICE OF CANCELLATION AFTER INSPECTION

DATE OF CONCLUSION OF INSPECTION TOUR OF PROPERTY: _____

LOT IDENTIFICATION: _____

NAME OF CUSTOMER: _____

You may cancel your contract without any penalty or obligation at any time prior to midnight [20]of the tenth business day after the above date. No sales representative should contact you on behalf of the seller during this ten business day period. If a sales representative contacts you, and you notify us of the contact within 10 days of its occurrence, you will have 30 days from the date of your visit to cancel this contract.

If you cancel, we will promptly send you a full refund.

To cancel your contract, mail or deliver a signed copy of this cancellation notice or any other written notice, or send a telegram to (name of respondent), at (address of respondent's place of business), postmarked not later than midnight of _____

I (we) hereby cancel the above described contract. (Each buyer must sign this notice).

_____

DATE

_____

BUYER'S SIGNATURE [21]

6. Before furnishing a purchaser copies of the "Notice of Cancellation After Inspection" set forth above, respondent shall complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property, the name of the customer, and the date, not earlier than the tenth business day following the conclusion of the inspection, by which the purchaser may cancel the purchase.

7. During the post inspection cancellation period, Horizon is forbidden to initiate any sales related contact with the purchaser. Any such initiation of contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of thirty days from the date of the visit, but only if the customer notifies Horizon of the contact within ten days of its occurrence.

8. Respondent shall investigate any notification received from purchasers of contact violating the provisions of III.E.7. above. **[22]**

9. Respondent shall honor any signed and timely Notice of Cancellation After Inspection or its functional equivalent submitted by a purchaser, and promptly after receipt of such notice will (a) refund all payments made under the contract, (b) cancel the contract executed by the purchaser, and (c) send written confirmation of such cancellation to the purchaser.

Provided, however, That if the property has been deeded to the purchaser, Horizon may require that the property be reconveyed to Horizon with the same condition of title as was conveyed to the customer.

10. Where a timely Notice of Cancellation After Inspection or its functional equivalent is received purportedly in accordance with the requirements of this section, but where said notice is not sufficient or proper in some manner and respondent does not intend to honor the notice, Horizon shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund. **[23]**

F. Include in all contracts for the sale of land a provision limiting the amount of principal and interest to be forfeited by the purchaser in the event of the purchaser's default to an amount not greater than (1) 44 percent of the cash price of the property plus (2) any amount paid which exceeds the cash price of the property.

G. Refund to each person who purchases land after the date this Order becomes final and defaults on his or her contract, all principal and interest paid which exceeds 44 percent of the cash price of the land up to a maximum refund of 56 percent of the cash price of the lot. Such refund shall be made within sixty (60) days after the purchaser is deemed to have defaulted; *provided, however,* that this paragraph shall not preclude respondent from offering a defaulting purchaser additional alternatives which may be selected at the purchaser's option, in lieu of a refund. For purposes of this section of the Order, a purchaser shall be deemed to have defaulted when either of the following occurs: **[24]**

1. the purchaser notifies respondent of intent to default; or
2. the purchaser fails to make a payment for a period of six months from the due date of a payment; *provided, however,* that this provision shall not prohibit respondent from granting any purchaser an extension of time within which to make payments.

H. Respondent shall not misrepresent the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation in order to solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon such right. **[25]**

IV

It is ordered, That respondent in connection with the advertising, offering for sale and sale of lots or land other than those lots or land covered by parts I, II and III of this Order, do forthwith cease and desist from:

A. Representing that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment, unless respondent can demonstrate that such is a fact and is not misleading.
2. There is little or no financial risk involved in the purchase of respondent's land, unless respondent can demonstrate that such is a fact and is not misleading.

3. The resale of land purchased from respondent is not, or will not be difficult, unless respondent can demonstrate that such is a fact and is not misleading.

4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, unless such is a fact, and unless the terms, conditions and arrangements for repurchase, resale or assistance are clearly and conspicuously disclosed at the time such representation is made. **[26]**

5. The value of any land, wherever situated, whether or not marketed by respondent has risen, is rising, or will rise, unless respondent can demonstrate that such is a fact and is not misleading.

6. Lots to which respondent has given one designation, such as "single-family residential," "multi-family residential," "commercial," "acreage" or terms of similar import, have a significantly different present or expected value than lots with any other designation unless (i) such representation is true and is not misleading, (ii) respondent has a reasonable basis at the time of making such representation to believe that it is true, and (iii) respondent discloses clearly and conspicuously in immediate conjunction with the use of any such designation: A lot's designation as [specify designation, *e.g.*, multi-family] will have no bearing on whether such use will occur.

7. The price set by respondent for the land is equivalent to the market value of the land, unless adequate market data on resales (including attempts to resell and listings for resale that are known or should be known by respondent) of similar land (land in a similar location with the same degree of development) by previous purchasers in the possession of respondent at the time of such representation substantiates the representation. **[27]**

8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money.

9. The purchase of land in general is a good, profitable, safe or sound investment.

10. The demand for land offered for sale by respondent has increased, is increasing, or will increase, unless respondent can demonstrate that such is a fact and is not misleading.

11. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing, unless such is a fact and is not misleading.

12. Purchasers must purchase immediately in order to insure that a particularly desirable location will be available, or that lots similar to those being offered for sale may not or will not be

available at the same price in the foreseeable future, unless such representation is true and is not misleading. [28]

13. Purchasers have been specially selected, unless respondent can demonstrate that such is a fact and is not misleading.

14. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser, including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided,* that respondent may accurately recite the terms and conditions of the contract and of all refund privileges and cancellation rights, if applicable.

15. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

16. Any of the lots is located within a geographic area designated or described as a "community," "town," "city," or by words or terms of similar import; *provided, however,* that respondent shall not be obligated to rename any currently platted property. [29]

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in price, including reference by actual dollar amount, percentage increase, or by any other means, as indicative of market value, or of a change of market value.

2. The past, present or future population, employment or industrial statistics or trends or other statistics or trends in a geographic area, unless respondent has a reasonable basis at the time of the statement or representation to conclude that such statistical trend either now has or, within the near future, will have a significant effect on respondent's property or the part thereof, other than those parts of each property which respondent or any other entity has reserved for development, or has developed with roads, and electric, water, telephone, and sewer lines, to which such statement or representation refers or relates.

3. The present, planned, proposed or potential development, improvement or facilities of the unit, [30]subdivision or project in which the offered land is located that differs in any material respect from the relevant language of the most current property report or from the "Notice to Buyers" (set forth in Part V of this Order).

4. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment.

5. The reservation or consideration by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to any reference to any other person having a "hold" on a lot; *provided, however,* that respondent may refer to any bona fide sale or option on a lot for which it receives consideration.

6. Respondent's reputation, size, assets or listing on any stock exchange; *provided,* that respondent may make such references as are required by statute or regulation in the place and manner required by such statutes or regulations; and *provided, further,* that **[31]**respondent may provide any purchaser or prospective purchaser upon request with any document prepared in accordance with the rules of the Securities and Exchange Commission, the Department of Housing and Urban Development, or the Office of Interstate Land Sales Registration.

7. The present, planned, proposed or potential development of any land by anyone other than respondent.

8. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means:

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with a purchase decision or the purchase of respondent's land.

2. Failing to provide any required federal or state property report before the customer signs the contract; failing to recommend that the customer read the federal property report; interrupting or distracting any customer from reading a property report. **[32]**

3. Filling out a contract with a purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he or she desires to purchase the land being offered.

4. Subjecting a purchaser who has evidenced a desire not to purchase respondent's land to continued sales efforts from any sales representative or other employee other than the original sales person, i.e., any institution of a "T.O." or "takeover" system.

5. Including in any contract or in any other document shown or provided to purchasers, language stating that no express or implied representations have been made in connection with the sale of

respondent's land, or that any particular representation has not been made in connection therewith.

6. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any material respect from the rights or obligations of the parties as stated in the contract of sale, the Notice to Buyers provided for in Section V of this Order, or the property report. [33]

7. Including in any contract language permitting the respondent to retain any sums paid by the purchaser in excess of the amount permitted to be retained in Sections VI. H. and I. of this Order upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract.

8. Failing to disclose, clearly and conspicuously, both orally and in writing, to each customer the existence, size, location, significance and nature of any and all easements and other physical features which could significantly affect the full use and enjoyment of the lot being offered for sale.

9. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations and sightseeing tours. [34]

V

It is further ordered, That respondent:

Distribute to all prospective purchasers of land covered by this section, a copy of the following "Notice to Buyers" at the commencement of any sales presentation, request that the purchaser read it, and not interrupt the reading thereof by any purchaser. Where the sale is conducted entirely through the mail, the notice shall accompany the property report mailed to the purchaser. The Notice shall be on a separate piece of paper and shall contain only the required information and no other writing, unless approved in advance by the Commission.

NOTICE TO BUYERS

NAME OF SUBDIVISION:

NAME OF SELLER:

EFFECTIVE DATE OF NOTICE:

THE LAND BEING OFFERED FOR SALE IS IN THE STATE OF _____ MILES FROM THE CITY OF _____ . THE LOT IS _____ [ACRE(S) OR

SQUARE FEET] IN SIZE AND THE COST IS $ _____ . YOU MAY PURCHASE LOTS OTHER THAN THIS ONE.

THE SELLER IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS AN INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. [35]

THE FUTURE VALUE OF LAND IS UNCERTAIN AND MAY HAVE NO RELATION TO THE PRICE, WHICH IS SET BY THE SELLER. THE FUTURE POPULATION OF THIS SUBDIVISION AND THE SURROUNDING AREAS CANNOT BE PREDICTED.

[PROVIDE the following development information for the unit(s) being offered:]

ROADS

(INFORMATION TO BE APPLICABLE TO THE ROADS FRONTING PURCHASER'S LOT)

State who is currently responsible for construction and maintenance and whether the roads will be maintained by public authority, a property owners' association or some other entity at some time in the future. State the cost to buyer for construction/maintenance, if any, during interim and after turnover.

State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the roads as represented. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE ROADS. THEREFORE, THERE IS NO ASSURANCE THAT THEY WILL BE COMPLETED. [36]

Provide the following road information:*

Unit	Starting date	Percentage now completed	Estimated completion date	Present surface	Final surface**

* If not known, insert the following warning: WARNING THERE ARE NO PLANS FOR ROADS.

** If unpaved then state "UNPAVED" and describe the surface.

WATER

If water is to be supplied by an individual private system, state the estimated cost to the buyer of installation, treatment facilities, necessary equipment and any other required costs. If individual wells are to be used, state whether or not a refund or exchange will be issued in the event a productive well cannot be installed. If yes, state the terms and conditions thereof. If no, insert the following warning: WARNING: A SUCCESSFUL PRODUCING WELL IS NOT GUARANTEED. NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO DIG A SUCCESSFUL WELL. [37]

If the water is to be provided by a central system, state whether the buyer is to pay any construction costs, one-time connection fees, availability fees, special assessments or deposits for the central system. If so, state the estimated cost. If the buyer will be responsible for construction costs of the water mains, state the cost to install the mains to the most remote lot covered by the Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL WATER SYSTEM. THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED.

Provide the following water information:

Unit	Starting date	Percentage now complete	Service Available date*

* If not known, insert the following warning: WARNING: THERE ARE NO PLANS FOR A CENTRAL WATER SYSTEM. [38]

SEWER

State the method of sewage disposal to be used. If by septic tank or other individual system, state the estimated cost of the system and any necessary tests. State whether a permit is required. If so, and if each and every lot has not been already approved, insert the following warning: WARNING: THERE IS NO ASSURANCE PERMITS CAN BE OBTAINED FOR THE INSTALLATION AND USE OF SEPTIC TANKS OR OTHER INDIVIDUAL ON-SITE SEWAGE SYSTEMS. State whether or not a refund

or exchange will be issued in the event a permit is denied for the particular lot purchased, and the terms and conditions thereof. If neither will be issued, insert the following warning: WARNING: NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO INSTALL A SEPTIC TANK OR OTHER ON-SITE SEWAGE SYSTEM.

If a central sewage treatment and collection system is being installed, state who is responsible for construction of the system. State whether buyer will pay any construction costs, special assessments, one-time connection fees, availability fees, use fees or deposits. State the amounts of these charges. If the buyer is to pay the cost of the sewer mains, state the cost of installation of the mains to the most remote lot in this Notice. State whether there is adequate financial assurance [39]in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL SEWER SYSTEM. THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED. Provide the following sewer information:

Unit	Starting date	Percentage of completion	Service Availability date*

* If not known, insert the following warning: WARNING: THERE ARE NO PLANS FOR A CENTRAL SEWAGE SYSTEM.

ELECTRIC SERVICE

If the primary service lines have not been extended in front of, or adjacent to each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges for extension of primary lines. Based on that policy, state the cost to the buyer for extending primary service to the most remote lot in this Notice. Provide the following electric service information:

Unit	Starting date	Percentage of completion	Service Availability date*

* If not known, insert the following warning: WARNING: THERE ARE NO PLANS FOR AN ELECTRIC SERVICE SYSTEM. [40]

TELEPHONE SERVICE

If the service lines have not been extended in front of, or adjacent to each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges for extension of service lines. Based on that policy, state the cost to the buyer of extending service lines to the most remote lot in this Notice.

Provide the following telephone service information:

Unit	Starting date	Percentage of completion	Service Availability date*

* If not known, insert the following warning: WARNING: THERE ARE NO PLANS FOR A TELEPHONE SYSTEM.

RECREATIONAL FACILITIES

Identify each recreational facility. For each facility, provide the following information:

Facility	Percent complete	Date of start of construction	Date Available for use	Financial Assurance of completion*	Buyer's cost and assessments**

* If none, state "none." If such exists, state the type and amount. [41]

** State any construction or use costs to the buyer including any applicable property owner's association assessment, maintenance assessment or use fee.

At the conclusion of the Notice, place the following warning set off by a box outline: IMPORTANT: OBTAIN AND READ THOROUGHLY EACH PROPERTY REPORT AND CONTRACT BEFORE SIGNING ANYTHING. THE PROPERTY REPORT CONTAINS INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE YOU SIGN A CONTRACT TO BUY THIS LAND. IT IS DESIRABLE TO HAVE A LAWYER OR OTHER QUALIFIED PROFESSIONAL EVALUATE THIS PURCHASE BEFORE YOU SIGN ANYTHING. KEEP THIS NOTICE—STATEMENTS MADE IN IT BECOME A PART OF ANY CONTRACT YOU MAY SIGN WITH THE SELLER. [42]

VI

It is further ordered, That in all sales and offers to sell after the date this Order becomes final, respondent shall:

A. Include clearly and conspicuously:

1. In all contracts for the sale of land the following statement:

The seller is not selling the lots in this subdivision as an investment. Therefore, do not count on your lot rising in value or your being able to resell it. The future value of this land is uncertain and may have no relation to the price, which is set by the seller. It is suggested that you discuss any possible purchase with a lawyer or other qualified professional.

2. In all sales presentations, promotional materials and printed advertisements covered by this section the following statement:

The future value of land is very uncertain. The value, if any, of this land may have no relation to the price, which is set by the seller. The [43]seller is not selling the lots in this subdivision as an investment.

Therefore, do not count on your lot rising in value or your being able to resell it. It is suggested that you discuss any possible purchase with a lawyer or other qualified professional.

B. Include clearly and conspicuously in each contract for the sale of land the following statement, in 12 point bold face type:

YOU, THE BUYER. HAVE THE RIGHT TO CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE YOU SIGN THIS CONTRACT.

IF YOU CANCEL WITHIN THIS TIME, WE WILL PROMPTLY REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT.

TO CANCEL THIS CONTRACT, YOU MUST NOTIFY US WITHIN TEN BUSINESS DAYS AFTER YOU SIGN THE CONTRACT. NO SALESMAN WILL CONTACT YOU DURING THESE TEN DAYS. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN 30 DAYS OF ITS OCCURRENCE, YOU WILL HAVE UP TO 180 DAYS FROM THE DATE OF PURCHASE TO CANCEL THIS CONTRACT. [44]

During this ten–business–day period after the signing of a land purchase contract, Horizon is forbidden to initiate any sales-related contact with the purchaser. Any such contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of 180 days from the date of purchase, but only if the customer notifies Horizon of the contact within thirty days after its occurrence. *Provided, however,* That it shall not be forbidden for a non-sales employee or representative of Horizon to contact a customer by telephone to ascertain if the property report was

delivered, and to check the accuracy of the information on the contract.

Provided, That where Horizon as a matter of corporate practice or pursuant to any legal requirement provides a cancellation period exceeding ten business days, the highest applicable specific number of days greater than ten shall be substituted for "ten" or "tenth" wherever those words appear in the Notice of Cancellation set forth above. This requirement shall apply to Sections VI. C. and VI. D. of this Order as well as to this Section VI. B. **[45]**

C. Print the following in 12 point bold face type as a separate paragraph of the contract immediately preceding the space provided for the purchaser's signature:

YOU HAVE TEN BUSINESS DAYS IN WHICH TO RECONSIDER YOUR DECISION AND TO CANCEL THIS CONTRACT WITH FULL REFUND. HOWEVER, WE RECOMMEND THAT BEFORE SIGNING YOU EXAMINE CAREFULLY THIS CONTRACT AND THE PROPERTY REPORT AND HAVE THEM REVIEWED BY A LAWYER OR OTHER QUALIFIED PROFESSIONAL.

Provided, however, That in the event that any federal or state law or regulation requires that another statement immediately precede the space provided for the purchaser's signature, the above statement may precede such statements(s).

D. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in 12 point bold face type " NOTICE OF RIGHT OF CANCELLATION, " which shall contain in 10 point bold face type the following information and statements: **[46]**

_____

Date of Transaction

_____

Lot Identification

NOTICE OF RIGHT OF CANCELLATION

You may cancel this transaction without any penalty or obligation at any time prior to midnight of the tenth business day after the date shown on the contract. Use this time to examine with care this contract and property report. We suggest that you also use this time to have this contract and the property report reviewed by a lawyer or other qualified professional.

No sales representative should contact you on behalf of the seller during this ten business day period. If a sales representative contacts you, and you notify us of the

contact within 30 days of its occurrence, you will have up to 180 days from the date of purchase to cancel this contract.

If you cancel, any payments made by you under the contract will be returned promptly to you.

To cancel this contract, notify us not later than midnight of ____ that you want to cancel. Although you may notify us in any manner you choose, we recommend that you notify us by mailing a signed copy of this notice to (name of respondent) at (address). [47]

I (we) hereby cancel this contract. (Each buyer must sign this notice).

_____

Date

_____

Signature of Buyer

Respondent shall, before furnishing copies of this "Notice of Right of Cancellation" to the purchaser, complete both copies by entering the name of respondent, the address of the respondent's place of business, the date of the transaction, and lot identification(s), and the date, not earlier than the tenth business day following the date of the signing by the purchaser, by which the purchaser may give notice of cancellation.

Respondent shall, where the signature of a purchaser is solicited during the course of a sales presentation, inform each purchaser orally, at the time the purchaser signs the contract, of the right to cancel as stated in this Paragraph of this Order.

E. Honor any signed and timely notice of cancellation by the purchaser, or its functional equivalent, and promptly after the receipt of such notice, (a) refund all payments made under the contract and (b) cancel and return any contract or other legal document executed by the purchaser. [48]

Whenever a timely notice of cancellation or its functional equivalent is received and said notice is not sufficient or proper in any manner, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth business day following the purchaser's receipt of the mailing, if the purchaser is to obtain a refund.

F. Whenever respondent extends a privilege or other right

whereby the purchaser may exchange undeveloped land for a building lot:

1. Include in all materials, including the contract, which discuss the privilege or right, or if such privilege or right is described orally, include in such oral discussion, and in a concurrently delivered written notice, the following statement: BUILDING EXCHANGE LOTS EQUAL IN SIZE AND COST TO THE LOT YOU ARE PURCHASING MAY BE LOCATED SUBSTANTIAL DISTANCES FROM THE ESTABLISHED DEVELOPED AREAS. THEY MAY HAVE LESS DESIRABLE ROADS, UTILITIES AND APPEARANCE. THEREFORE, YOU MAY WISH TO EXCHANGE FOR OTHER BUILDING LOTS THAN THE SELLER MAY OFFER. THESE OTHER LOTS MAY BE SMALLER IN SIZE AND MAY REQUIRE YOU TO PAY MORE MONEY THAN YOU ARE NOW CONTRACTING TO PAY.

2. State the specific financial terms or formula for exchange of the purchaser's equity in the original [**49**]lot into the building lot, in the same place and manner as the statement in subparagraph 1 above.

3. Include in all contracts for the sale of land a provision extending the contractual rights and privileges of the purchaser to all subsequent buyers and assignees of that land.

G. Whenever respondent sells property sight unseen it shall extend a refund privilege conditioned upon the purchaser making a personal visit to the property within 180 days after purchase and notifying respondent within ten business days after inspection that a refund is desired. Respondent shall:

1. Provide the purchaser with a copy of the following "INSPECTION AND REFUND PRIVILEGE NOTICE " at the time the contract is signed. The notice shall be on a separate sheet of paper containing no other writing. The notice shall be worded as follows:

INSPECTION AND REFUND PRIVILEGE NOTICE

Personal inspection of any land purchased is desirable. We recommend that you visit your property. If you visit your property within the next 180 days, you can cancel your contract for any reason within 10 days after your visit and get a full refund. [**50**]

If you decide to inspect your land under the terms of the refund privilege, during the visit the seller may encourage you to keep your land. The seller may also try to sell you more land, or have you trade for a more expensive lot.

You should take time during your inspection to visit the local area and examine the real estate market where the lot is located.

If you cancel this purchase, the seller will not reimburse you for your travel expenses.

This inspection and refund privilege is in addition to and does not take away your

right to cancel within ten business days after you sign your contract. See your contract.

2. Provide the purchaser ten business days after making the personal inspection within which to request a refund.

3. Include in every contract, in immediate proximity to the provision setting forth the availability of this refund, the following statement: YOU HAVE UNTIL [51]MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE CONCLUSION OF YOUR IN PERSON INSPECTION IN WHICH TO NOTIFY THE SELLER OF A DECISION TO CANCEL. NO REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS TEN BUSINESS DAY PERIOD. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN TEN DAYS OF ITS OCCURRENCE, YOU WILL HAVE 30 DAYS FROM THE DATE OF YOUR VISIT TO CANCEL THIS CONTRACT.

4. Insure that every purchaser who seeks to view his or her lot can see and identify the particular lot specified in the contract; *provided, however,* that so long as the lot can be located by a stake at one corner or other definite landmark, it is not necessary that all four corners be marked.

5. Orally inform the purchaser of the post–visit ten–business–day cancellation right (i) at the time the contract is signed, unless the sale is entirely completed through the mail, and (ii) at the conclusion of the inspection visit.

6. Furnish each purchaser at the conclusion of the inspection visit with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION " which shall contain in bold face type of a minimum size of 10 point, the following statement: [52]

NOTICE OF CANCELLATION AFTER INSPECTION

DATE OF CONCLUSION OF INSPECTION TOUR

OF PROPERTY: _____.

LOT IDENTIFICATION: _____.

NAME OF CUSTOMER: _____.

You may cancel your contract without any penalty or obligation at any time prior to midnight of the tenth business day after the above date. No sales representative of the seller should contact you in any way during this ten business day period. If a sales representative contacts you and you notify us of the contact within 10 days of its occurrence, you will have 30 days from the date of your visit to cancel the contract.

If you cancel, we will promptly send you a full refund.

To cancel your contract, mail or deliver a signed copy of this cancellation notice or any other written notice, or send a telegram to (name of respondent), at (address of

respondent's place of business), postmarked not later than midnight of _____. [53]

I (we) hereby cancel the above described contract. (each buyer must sign this notice).

_____
DATE

_____
Buyer's signature

7. Before furnishing a purchaser copies of the "Notice of Cancellation After Inspection" set forth in paragraph VI. G. 6. above, complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property, the name of the customer, and the date, not earlier than the tenth business day following the conclusion of the inspection, by which the purchaser may cancel the purchase.

8. During the post–inspection cancellation period, Horizon is forbidden to initiate any sales related contact with the purchaser. Any such initiation of contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of thirty days from the date of the conclusion of the visit, but only if the customer notifies Horizon of the contact within ten days of its occurrence. [54]

9. Investigate any notification received from purchasers of contact violating the provision of Paragraphs VI. G. 8. above, and comply with the requirements of Section X, Paragraphs F and G herein.

10. Honor any signed and timely Notice of Cancellation After Inspection or its functional equipment submitted by a purchaser, and promptly after the receipt of such Notice (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

11. Where a timely Notice of Cancellation After Inspection or its functional equivalent is received purportedly in accordance with the requirements of this section, but where said notice is not sufficient or proper in some manner and respondent does not intend to honor the notice immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth day

following the purchaser's receipt of the mailing if the purchaser is to obtain a refund. **[55]**

H. Include in all contracts for the sale of land a provision limiting the amount of moneys to be forefeited by a purchaser in the event of the purchaser's default under the contract to an amount not greater than respondent's actual damages from such forfeiture, such provision to include the definition of "actual damages" set forth in Section VI. I. below.

I. Refund to customers who purchase after the effective date of this order and who are deemed in default, all moneys paid under the contract, including but not limited to principal, interest, taxes, and assessments which in the aggregate exceed respondent's "actual damages", as that term is defined below, within 60 days after the purchaser is deemed to have defaulted; *provided,* that this paragraph shall not preclude respondent from offering a defaulting purchaser additional alternatives which may be selected at the purchaser's option, in lieu of a refund. For purposes of this section of the Order, a purchaser shall be deemed to have defaulted when either of the following occurs:

1. purchaser notifies respondent of intent to default; or
2. purchaser has failed to make a payment for a period of six months from the due date of such payment. **[56]**

"Actual damages" upon a buyer's default shall be limited to respondent's actual out-of-pocket costs for commissions and overrides paid out to sales personnel and not recovered from them in connection with the cancellation of an account or contract to buy property from respondent as a result of the buyer's default, *provided,* that the amount of the actual damages may not exceed 15 percent of the cash price of the property, as "cash price" is defined in the Truth-In-Lending Act's implementing Regulation Z (12 CFR 226.2(n)).

J. Forbear from using or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any purchaser, a contract clause which provides that the respondent may retain all sums previously paid by the purchaser in the event that the purchaser fails to pay any installment due or otherwise to perform any obligation under the contract.

K. Not misrepresent, nor solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon, the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation. **[57]**

VII

It is further ordered, That respondent shall establish the Horizon Corporation Trust Fund for the benefit of past purchasers of lots from respondent on the following basis:

1. The trust fund will be established not later than fifteen (15) days following the date this Order is issued by the Commission in final form.

2. The trustee shall be a national bank mutually agreeable to respondent and the Commission, pursuant to a trust agreement also mutually agreeable to respondent and the Commission.

3. Not later than thirty (30) days following the date this Order is issued in final form respondent shall issue a debenture payable to the "Horizon Corporation Trust Fund," and deliver it to the trustee.

4. The debenture will be a six (6) year noninterest bearing debenture in the principal amount of $14.5 million, payable in six equal installments with the first such installment being due on June 1, 1982, and subsequent installments being due on each June 1 thereafter to and including June 1, 1987. **[58]**

Payments into the trust fund shall be due and payable on the dates specified in this paragraph. The trustee shall receive each of the payments specified in this Order no later than seven days after it is due and payable. Respondent shall be in violation of the terms of this Order if it fails to make any of the payments specified in this agreement within the period ending seven days after such payment is due and payable. Interest payments required by Paragraph VII (8) of this Order shall continue to apply to any delay in payment beyond the date when it is due and payable. Such interest payments shall be required regardless of any allegation of a violation of this Order as described in this paragraph. **[59]**

5. The trustee shall maintain the corpus of the trust fund in general obligations of or obligations guaranteed by the United States Government or an agency of the United States Government. All interest earned during the pendency of the trust fund shall be added to the corpus of the trust fund.

6. The trustee shall make the books and records of the trust fund available to the Federal Trade Commission or a representative thereof for inspection and copying during normal business hours at any time(s) until sixty (60) days following the final disposal of the trust fund residue. The trustee and respondent shall be given twenty-four (24) hours advance notice of any inspection of the trust fund books and records by the Commission. The trustee shall provide

an annual report in the nature of an accounting of the trust fund to the Commission.

7. No costs associated with the establishment, administration or distribution of the trust fund shall be paid out of the principal or interest of the fund, except as provided in paragraph 18 if there is a third distribution of funds. **[60]**

8. If any of the six annual payments into the trust fund shall not be made on the date any such payment is due, Horizon shall pay interest on the principal amount then due and owing at a rate which is two percent (2%) above the prime interest rate at Citibank, New York, at the close of business on the date the payment is due or the first business day thereafter.

9. Within thirty (30) days following the third payment into the trust fund, the trustee shall distribute substantially all of the money then in the trust fund to the persons eligible for payments from the fund as determined herein.

10. Within thirty (30) days following the final payment into the trust fund, the trustee shall distribute all of the money in the trust fund to the persons eligible for payments from the fund as determined herein.

11. The persons eligible for payment from the trust fund shall be those who meet the criteria listed on Exhibit A attached hereto.

12. Purchasers eligible for payment from the trust fund shall be mailed a copy of the letter attached hereto as Exhibit B within 180 days from the date this Order is issued in final form by the Commission. **[61]**

13. Any person eligible for payment from the trust fund who cannot be located by respondent shall forfeit his or her right to receive the notification in Exhibit B and the two payments from the trust fund. Respondent shall exercise good faith efforts reasonably calculated to locate all persons eligible for payments from the trust fund. Such efforts shall include:

(a) Mailing the notification to the most current address as disclosed in respondent's records or on the county tax rolls, if such tax rolls are reasonably available from the county in which the person's land is located.

(b) Confirming addresses with the appropriate improvement association, if any.

(c) If necessary, mailing a second notification letter with an address correction requested from the Post Office.

(d) Telephoning any person whose mailing address cannot be discovered through the above methods. Respondent shall, to the

extent necessary, telephone the last known home and business telephone number of the person, and seek information from directory assistance at the person's last known address. **[62]**

If the above efforts are unavailing, the person shall be removed from the list of eligible persons; *provided, however,* that the person shall be reinstated if respondent or the trustee should be informed of his or her current mailing address not less than thirty (30) days prior to either of the disbursements from the trust fund. If such person is reinstated as eligible for a payment from the trust fund after the initial disbursement from the fund, his or her right to a payment shall be limited to his or her proportionate share of the second distribution.

14. Persons eligible for a payment from the trust fund will be informed in the notification letter that they must inform respondent of all address changes until the final distribution of the fund. A form for such notification, attached hereto as Exhibit D, will be provided to each eligible person for this purpose. Respondent will inform the trustee of all such address changes not less than thirty (30) days prior to each distribution from the trust fund. If any person's payment check is returned by the Post Office as being undeliverable because of incorrect address, and if the person failed to inform respondent of a change of address which has occurred, such person will forfeit any right to a share of the distribution. **[63]**

15. Respondent may, at its sole discretion, require each eligible person to sign a waiver of claims in the form attached hereto as Exhibit C as a condition precedent to receiving payment from the trust fund.

16. Persons eligible for refunds will not be required to reconvey property to respondent to qualify for payment from the trust fund.

17. Each eligible person will receive a pro rata share of the trust fund distribution to which he or she is entitled, to be determined on the basis of the ratio of his or her payments of principal to respondent to the total of all such payments from June 1, 1969 to the date of each distribution by all persons eligible for payments from the trust fund. Payment will be made by check drawn on the trust fund and mailed to eligible persons by first class mail.

18. The trustee will be instructed to make all reasonable efforts to distribute the entire trust fund. Any residue in the fund resulting from interest earned after checks are mailed to eligible persons or from checks not cashed for a period of six (6) months after distribution or other causes will be donated in equal shares to the Horizon Communities Improvement Association, **[64]**Inc., the Horizon Communities Improvement Association of New Mexico, Inc., the

Tierra Grande Improvement Association, Inc., and the Waterwood Improvement Association, Inc. *Provided, however,* That if the residue exceeds $250,000 the trustee may redistribute the residue to those purchasers who cashed the second distribution check. All expenses of such redistribution shall be paid from the residue of the trust fund, and no such distribution shall be made unless the expenses of the distribution are not more than 25 percent of the trust fund residue. Any residue remaining after the third distribution shall be distributed to the improvement associations as provided above. **[65]**

VIII

It is further ordered, That respondent shall assure that it and other entities will spend not less than $45 million for improvements in the properties within the twenty years following the date this Order becomes final. Such expenditures may be made for improvements in Rio Communities, Horizon City, Arizona Sunsites, Waterwood, and/or Paradise Hills. The improvements may include roads, utilities, hotels, residential apartments, commercial facilities, recreational facilities, churches, civic buildings, or any other improvements or facilities, except that expenditures for construction of single family residences shall not be included in the computation of the $45 million. To qualify under this provision, the improvements must be located within the confines of the properties listed above. The only exception to this locational requirement is that expenditures to construct utility plants and transmission or pipe lines predominantly to serve a Horizon property shall be included, notwithstanding that the plant and the transmission or pipe lines may not be located within one of the five properties enumerated above. **[66]**The expenditure of funds required by this paragraph shall be made according to the following schedule:

$11.25 million shall be spent within 7 years of the effective date of this Order; $22.5 million shall be spent within 10 years of the effective date of this Order; $33.75 million shall be spent within 15 years of the effective date of this Order; $45 million shall be spent within 20 years of the effective date of this Order.

IX

It is further ordered, That not more than one officer or employee of respondent shall at any one time serve on the boards of directors of each of the following: Horizon Communities Improvement Association, Inc., the Horizon Communities Improvement Association of

New Mexico, Inc., the Tierra Grande Improvement Association, Inc. and the Waterwood Improvement Association, Inc. [67]

X

It is further ordered, That respondent, Horizon Corporation shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future sales representatives and other employees, independent brokers, advertising agencies, and others who sell or promote the sale of respondent's land;

B. Provide each person so described in Paragraph A above with a form to be returned to respondent, clearly stating each person's intention to conform his or her business practices to the requirements of this Order.

C. Inform each person described in Paragraph A above that respondent shall not use the services of any such person, unless such person agrees to and does file a notice with respondent that he or she will conform his or her business practices to the requirements of this Order;

D. In the event such person will not agree to so file notice with the respondent and to conform his or her business practices to the requirements of this Order, respondent shall not use the services of such person; [68]

E. Inform the persons described in Paragraph A above that respondent is obligated by this Order to discontinue dealing with those persons who engage on their own in the acts or practices prohibited by this Order or who fail to adhere to the affirmative requirements of the Order;

F. Institute a reasonable program of continuing surveillance to reveal whether the sales practices of each of said persons described in Paragraph A above conform to the requirements of this Order, and promptly investigate and make good faith efforts to resolve any complaints about such persons received by respondent, and maintain records of any such complaint, investigation and disposition for five years from the date of the disposition of the complaint;

G. Discontinue dealing with any person described in Paragraph A above revealed by the aforesaid program of surveillance, who more than once engages on his or her own in the acts or practices prohibited by this Order; *provided, however,* that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondent in any proceeding brought to recover penalties for alleged violations of any paragraph of this Order. [69]

XI

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment, reorganization or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or other change in the corporation which may affect compliance obligations arising out of this Order. **[70]**

XII

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its subsidiaries. **[71]**

XIII

It is further ordered, That respondent shall within sixty (60) days after the service upon it of this Order, and annually thereafter until sixty (60) days after the final disbursement of funds in the trust funds established in part VII. herein, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order. **[72]**

XIV

The relief set forth in this Order fully satisfies any claim for consumer redress which the Commission may have under Sections 5 and 19 of the Federal Trade Commission Act arising out of the acts and practices alleged in the complaint in this matter.

Exhibit A

To be eligible for a partial refund from Horizon Corporation, a person must meet all of the following criteria:

1. The person must have contracted to purchase a lot from Horizon Corporation at any time from June 1, 1969 to August 31, 1974.
2. The purchaser must either:

(a) have completed paying for the lot; or

(b) be current in making payments to Horizon when the trustee distributes the partial refunds; or

(c) have defaulted on his or her contract after paying 75% or more of the purchase price.

3. The lot purchaser must not have received prior relief of any of the following types from Horizon:

(a) Relief amounting to at least 25% of the cash price of the lot from (i) a refund, (ii) a judgment in a lawsuit, or (iii) a reduction in the price of the lot; or

(b) an exchange of the lot initially purchased for a lot developed with a road and utilities; or

(c) an exchange of the original lot for a lot in Paradise Hills pursuant to the filing of a claim in the settlement of the class action entitled *O'Neil v. Horizon Corp.*, No. Civ. 75–133 (D. Ariz. 1975).

4. No refunds will be given for any purchase prior to June 1, 1969. If as a result of an exchange or a subsequent purchase after June 1, 1969 the purchaser's contract is increased, a refund will be given based only on the increase in the contract price.

Exhibit B

Important: We owe you a partial refund.

Dear Customer:

We are sending this letter to you under an order issued by the Federal Trade Commission.

In 1975, the Federal Trade Commission filed a complaint against Horizon Corporation concerning its past sales practices. As part of the resolution of this complaint, Horizon will refund to you a portion of the purchase price of the land you purchased from us. Horizon also will spend or cause to be spent $45 million for development in its properties over the next twenty (20) years, and will refrain from certain sales practices in the future.

The following questions and answers explain how much money you are entitled to receive, the options you have, and some important information about your land.

Who is entitled to a refund?

Refunds will be made to all customers of Horizon who satisfy the following conditions:

1. You must have purchased a lot from Horizon Corporation at any time from June 1, 1969 to August 31, 1974. If your purchase during this time period was an exchange of a lot purchased prior to June 1, 1969, your partial refund will be based only on the increased contract price.

2. You must have completed paying for your lot *or* be current in your payments to Horizon when the trustee distributes the refunds *or* have defaulted on your contract after paying 75% or more of the cash price. (The cash price is the price of the lot excluding interest.)

3. You will not receive a partial refund if you have already received a reduction in the cash price of your lot of 25% or more, a refund of 25% or more of the cash price of your lot, an exchange for a lot developed with a road and utilities, or an exchange for a lot in Paradise Hills as part of the settlement of the class action suit entitled *O'Neil v. Horizon Corporation.*

Our records show that you are entitled to a refund.

How much money will be refunded?

Horizon will pay $14.5 million into a trust fund over the next six years. This money, plus the interest earned on it, will be distributed to the eligible customers in two (2) payments. We estimate that each customer will receive about 12% of the cash price of the lot(s) purchased. Of course, your refund may be more or less than that amount depending on such factors as the number of customers seeking refunds.

When will I receive my refund?

You will receive part of your refund in July 1984. The rest will be paid in July 1987.

What do I have to do to receive my refund?

You must sign the attached notice and return it to Horizon in the self-addressed envelope within ninety (90) days. IMPORTANT - by signing this notice you give up any right you may have to sue Horizon for all claims of any kind arising from the transaction for your purchase of land, that is, the manner in which the land was marketed, the purchase contract and the circumstances in which the contract was signed. If you have questions, we suggest you consult a lawyer before you sign this.

You must also keep us informed of any changes in your address. This is important. If we cannot find you when we mail out the refund checks, you will lose your right to a refund. An address change form is enclosed in this letter for your convenience. You do not have to use this form so long as you tell us either in person or by mail each time you move.

What should I do if I do not receive my checks?

If you have not received your first check by August 1, 1984 or have not received your second check by August 1, 1987 you should write to us as soon as possible.

Do I have to give back my land?

No. You do not have to give back the land to receive this refund.

What are the plans for developing my lot?

The lot you have purchased is completely undeveloped. Unless your lot is located in Waterwood, Horizon has no plans to develop your lot. If your lot is in Waterwood, consult your contract. In properties other than Whispering Ranch your lot is or will be accessible by a road, paved in Waterwood and unpaved in the other properties. It may or may not be possible to develop your lot or extend utility lines to it. Your contract may give you the right to exchange your lot for a fully developed lot. An exchange will cost you more money. If you have questions, please refer to your contract or write to Horizon Corporation.

What are Horizon's plans for development?

Horizon will spend, or will assure that others spend, at least $45 million in development over the next twenty years. This money will be spent for roads, utilities, stores, apartment houses, recreational facilities, civic buildings, or other improvements within the properties. The money will not be used to improve your lot. The improvements may or may not directly benefit you or your lot.

Can I resell my lot?

There is virtually no resale market at the present time for lots which have not been developed with utilities. It is unlikely that you could resell your lot at the present time. There is no certainty that prospects for resale will improve in the future. The

growth of nearby cities may not make resale of your lot any easier. Horizon is not obligated to buy back your lot or help you resell it.

What efforts will Horizon make to reduce my property taxes?

Horizon does not have direct control over the amount of your property taxes. However, Horizon filed suit in El Paso County to reduce property taxes on land in Horizon City. As a result of this suit, property taxes for many lots in Horizon City declined from about $14.00 per year to $8.00 per year. Similar efforts are now underway concerning Rio Communities.

What options do I have?

You have three options with respect to your lot.

1. You may accept our refund offer and keep your land. You may also accept our refund offer and exchange your land if your contract permits an exchange. If you have not fully paid for your property, you will have to continue making your payments in order to keep your land or exchange it. See your contract for a full explanation of the exchange privilege that applies to your land.

2. You can refuse to make any further payments that are due under your contract.

If you refuse to make further payments *after* you have already paid 75% or more of the cash price, you will be eligible for the refund described above. If you stop paying *before* you have paid 75% of the cash price, you will *not* be eligible for the refund described above. (Only payments of principal count toward the 75%.)

In either case, you will lose your land and all the payments you have made.

3. Instead of accepting the refund described above, you may seek redress for any injury you believe Horizon has caused you. If you were a member of the class in the *O'Neil* suit or have previously accepted relief from Horizon, you may not be able to choose this option. We recommend that you consult an attorney before you choose this option.

If I have other questions, whom should I contact?

If you have questions about this offer, please write to us at the following address:

Refund Offer
Horizon Corporation
Post Office Box 27324
Tucson, Arizona 85726

We will answer your questions promptly.

We recommend that you keep this letter for future reference.

Sincerely,

Donald C. White
President
Horizon Corporation

Exhibit C

This letter must be signed and mailed to Horizon within 90 days if you wish to receive a refund.

Notice of Acceptance of Partial Refund and Waiver of Claims

I hereby accept Horizon Corporation's offer of a partial refund as set forth in the letter of ____(Date)_____.

Before signing this notice I read the accompanying letter. I understand that the refund will be paid in two installments, in 1984 and 1987, and that the amount of the refund will depend on the number of customers asking for refunds, the amount of money I have paid for my property, and other similar factors.

In consideration of the partial refund, I release and discharge Horizon Corporation from all claims of any kind arising from the transaction for my purchase of land, that is, the manner in which the land was marketed, the purchase contract and the circumstances under which the contract was signed. This includes, without limitation, claims for rescission, restitution, compensatory damages, punitive damages, penalties, specific performance, injunctive or declaratory relief. This applies to all claims which I could assert against Horizon or its directors, officers, agents, employees or representatives based upon or arising out of the transaction or transactions for which I will receive partial refunds.

I further agree to inform Horizon Corporation promptly of any changes in my mailing address which occur prior to the time I have received my two refund checks.

_____

Signature (each purchaser must sign)

_____ _____

Contract Number Please print your name

_____

Address

Exhibit D

Address Change Notification

IMPORTANT

You are entitled to receive two partial refund checks from Horizon Corporation. You must keep us informed of any change in your address until you receive *both* checks. If we cannot find you, you will lose your right to a refund.

You may inform us of address changes in person or by mail. Our address is:

Refund Offer
Horizon Corporation
Post Office Box 27324
Tucson, Arizona 85726

You may use this form to tell us your address has changed.

Name of Customer	New Street Address
Contract Number or Identification of Lot	New City, State & Zip Code

Remember, you must inform us of all changes in your address until you have received *two* checks from us.

Sincerely,

Donald C. White
President
Horizon Corporation

345-554 O—82——58

IN THE MATTER OF

JAMES B. LANSING SOUND, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-1785. Decision, Aug. 24, 1970—Modifying Order, May 20, 1981

This order reopens the proceeding and modifies the order issued by the Commission on August 24, 1970, 77 F.T.C. 1165, 35 FR 15807, by replacing Paragraph I(2) of the original order with one containing additional language which permits the firm to establish lawful, reasonable and non-discriminatory minimum standards for its dealers and to withhold its products from dealers who fail to maintain those standards.

REOPENING AND MODIFICATION OF ORDER

By petition of April 10, 1981, respondent James B. Lansing Sound, Inc. ("JBL") requests that Paragraph I(2) of the Commission's order issued against JBL on August 24, 1970 be modified so that the order would no longer prohibit JBL from establishing performance standards for sellers of its loudspeakers. Pursuant to Section 2.51 of the Commission's Rules of Practice the petition was placed on the public record for comment. Attorneys for Best Products Co., Inc. filed the only comment requesting that the Commission deny JBL's petition.

JBL had previously petitioned the Commission to modify the consent order; the Commission denied this petition by order dated August 29, 1978. The Commission found that although there had been a change of law since the order was issued the petition had made an inadequate showing of the need for the requested relief.

Upon consideration of JBL's petition and supporting materials and the public comment, the Commission now finds that JBL has a very small market share and that JBL would likely suffer significant competitive injury unless the order is modified. Further the Commission notes that the proposed modification relates only to a nonprice vertical restraint that the Commission's complaint had not alleged to be a reinforcing mechanism for resale price fixing. For these reasons the Commission has determined that the order should be modified.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following for Paragraph I(2).

2. Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons,

business or class of businesses, except as expressly provided herein. This order shall not prohibit James B. Lansing Sound, Inc. from establishing lawful, reasonable, and non-discriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability; nor shall this order prohibit respondent from requiring its dealers who sell JBL products for resale to make such sales only to dealers who maintain such minimum standards.

Commissioner Pertschuk did not participate. Commissioner Bailey voted in the negative.

IN THE MATTER OF

SHAKLEE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2790. Decision, Feb. 18, 1976—Modifying Order, June 1, 1981

This order reopens the proceeding and modifies the order issued by the Commission on February 18, 1976, 87 F.T.C. 239, 41 FR 11480, by modifying Paragraph I of the Order so as to eliminate the provisions prohibiting the firm from restricting retail store sales or cross-group sales, except when related to resale price maintenance; and by providing certain protections for existing distributors.

ORDER REOPENING PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

The Commission on May 8, 1981, having issued an order against respondent to show cause why the proceeding herein should not be reopened for the purpose of modifying Paragraph I of the consent order to cease and desist entered on February 18, 1976; and Respondent having answered that it has no objection to the reopening of the proceeding and the modification of the consent order, as set forth in the order to show cause.

Accordingly, *it is ordered,* That the matter is reopened and that Paragraph I of the order herein is modified so that it will read:

I

It is ordered, That respondent Shaklee Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of goods or commodities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Fixing, establishing, maintaining or otherwise controlling, or attempting to fix, establish, maintain or otherwise control, directly or indirectly, the prices and to the extent, if at all, they relate to the pricing of merchandise for resale, discounts, rebates, overrides, commissions, fees or bonuses or other terms or conditions of sale; *provided,* that from the date this Order becomes final:

(a) If respondent suggests to its distributors prices for resale of its

merchandise, it must state clearly and conspicuously in conjunction therewith the following statement:

The prices quoted herein are suggested only. You are free to determine for yourself the prices you charge.

(b) If respondent suggests to its distributors discounts, rebates, overrides, commissions, fees or bonuses or other terms or conditions of sale to the extent, if at all, they relate to pricing of merchandise for resale, it must state clearly and conspicuously in conjunction therewith the following statement:

The (e.g.) discounts quoted herein are suggested only. You are free to determine for yourself the discount you grant.

2. Requiring, coercing, threatening or otherwise exerting pressure on any distributor, directly or indirectly, to observe, maintain or advertise established or suggested retail prices.

3. Requiring or requesting any distributor, directly or indirectly, to report any person or firm who does not observe the retail prices established or suggested by respondent, or acting upon reports so obtained by refusing or threatening to refuse sales to the distributor so reported.

4. Engaging in any of the following for the purpose of fixing or maintaining any resale price or in connection with the fixing or maintaining of any resale price:

(a) Requiring, contracting with, or coercing, directly or indirectly, any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business or class of businesses.

(b) Requiring, contracting with, or coercing, directly or indirectly, any distributor to refrain from establishing a fixed retail location for the sale or distribution of any merchandise in any quantity.

(c) Requiring or requesting any distributor, directly or indirectly, to report to respondent or to any person it designates, any person or firm who sells any of respondent's merchandise to a retail store or from a fixed retail location, or acting upon reports so obtained by refusing or threatening to refuse sales to the distributor so reported.

5. Preventing or discouraging, or attempting to prevent or discourage any distributor from selling or offering for sale products to retail customers on the grounds that such customer is the customer of another distributor.

6. Until March 1, 1986, restricting, prohibiting, taking any action against, threatening or otherwise interfering with a distributor's

operation of a retail store owned or, if leased by a distributor, during the remaining term of the lease (but no later than March 1, 1986), *provided,* that:

(a) For distributors as of July 1, 1980 the store was acquired or the lease was executed prior to July 1, 1980 and for those becoming distributors after July 1, 1980 the store was acquired or the lease was executed prior to notice of the May 8, 1981 Order to Show Cause in this matter;

(b) Shaklee products account for more than 35 percent of the store's retail sales;

(c) The distributor provides to the respondent, within 60 days of actual notice of this order, evidence of ownership or a copy of the lease and evidence that Shaklee products accounted for more than 35 percent of the facility's retail sales, during the six month period prior to notice of the May 8, 1981 Order to Show Cause in this matter.

Provided, however, that nothing contained in this paragraph shall prohibit respondent and a distributor from entering an agreement pursuant to which the distributor voluntarily agrees to discontinue such retail sales through an owned or leased facility. *Provided further,* that this paragraph shall not prohibit respondent from requiring a distributor to discontinue such retail sales through an owned or leased facility upon reimbursement by respondent for financial loss incurred by the distributor and attributable to the discontinuance of such retail sales. Such reimbursement shall consist of payment for (1) the cost of the portion of inventory in saleable condition (distributor net price less any bonuses paid by Shaklee) which was purchased prior to notice of the May 8, 1981 Order to Show Cause in this matter and exceeds $50.00 at distributor's cost (2) losses from subleasing or any lease termination penalty, and (3) the costs of conversion of a store to non-Shaklee uses. Any irreconcilable disagreement between respondent and a distributor with respect to the amount owed to a distributor under this paragraph shall be resolved by binding arbitration (arbitrator's fees to be paid by Shaklee).

7. Until March 1, 1986, restricting, prohibiting, taking any action against, threatening or otherwise interfering with a distributor's sales to a retail store from any property owned or, if leased by the distributor, during the remaining term of the lease (but no later than March 1, 1986), and principally used for sales to retail stores, *provided,* that:

(a) The property was acquired or the lease was executed after February 18, 1976 and prior to July 1, 1980;

(b) The inventory exceeds $200.00 in value and was acquired prior to notice of the May 8, 1981 Order To Show Cause in this matter;

(c) Shaklee products account for more than 35% of the gross dollar volume of sales from the distributor's property;

(d) More than 50 percent of the distributor's gross dollar volume of sales of Shaklee products were to retail stores;

(e) The distributor provides respondent within sixty days of actual notice of this order, evidence of ownership or a copy of the lease and evidence that more than 50 percent of the distributor's sales of Shaklee products were to retail stores during the six months prior to notice of the May 8, 1981 Order to Show Cause in this matter.

Provided, however, that nothing contained in this paragraph shall prohibit respondent and a distributor from entering an agreement pursuant to which the distributor voluntarily agrees to discontinue sales to retail stores. *Provided further,* that this paragraph shall not prohibit respondent from requiring a distributor to discontinue sales to retail stores upon reimbursement by respondent for the financial loss incurred by the distributor and attributable to the discontinuance of such sales to retail stores. Such reimbursement shall consist of payment for (1) the cost of the portion of inventory in saleable condition (distributor net price less any bonuses paid by Shaklee) which was purchased prior to notice of the May 8, 1981 Order To Show Cause in this matter and exceeds $50.00 at distributor's cost, (2) losses from subleasing or any lease termination penalty, and (3) the cost of conversion of such property to non-Shaklee uses. Any irreconcilable disagreement between respondent and a distributor with respect to the amount owed to a distributor under this paragraph shall be resolved by binding arbitration (arbitrator's fees to be paid by Shaklee).

IN THE MATTER OF

AMERICAN HOSPITAL SUPPLY CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3067. Complaint, June 2, 1981—Decision, June 2, 1981

This consent order requires, among other things, American Hospital Supply Corporation ("AHSC"), an Evanston, Illinois manufacturer and distributor of health care products, to timely divest, in accordance with the terms of the order, either 100 percent of the stock of American Latex Corporation ("ALC") or, all assets and properties constituting ALC together with all the assets of American Cystoscope Makers, Inc. The order further requires respondents to maintain ALC as a viable business entity pending divestiture; offer to purchase for a period of one year all urological catheters from the acquirer of ALC; and refrain for five years from acquiring more than 1 percent of stock or any interest in an entity engaged in the manufacture and distribution of urological catheters.

Appearances

For the Commission: *Norman A. Drezin, Karen G. Bokat, Randall S. Leff* and *Peter A. Sklarew.*

For the respondent: *Seymour D. Lewis, Rosenman Colin Freund Lewis & Cohen,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent, subject to the jurisdiction of the Commission, has acquired all the assets of American Cystoscope Makers, Inc. in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and having found that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the term *urological catheters* means any flexible product designed, promoted, and sold for insertion into the urethral orifice of a human or other animal in order to

drain, irrigate or otherwise provide access to the urinary bladder of said human or animal.

2. The term *urological catheter products* means all urological catheters sold separately and all urological catheter *kits* or *trays* that include a urological catheter and accessories used in conjunction with the insertion of a urological catheter.

II. RESPONDENT

3. American Hospital Supply Corporation (AHSC) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at One American Plaza, Evanston, Illinois.

4. In 1979 AHSC, including its foreign subsidiaries, had consolidated revenues of approximately $2.04 billion and consolidated assets of approximately $1.28 billion.

5. AHSC is a multinational manufacturer and distributor of a wide range of products used and consumed in the health care field including medical supplies, pharmaceuticals, medical and surgical instruments and laboratory supplies.

6. AHSC has been engaged in the manufacture and distribution of urological catheters through its American Pharmaseal Division and in the distribution of urological catheters through its American Hospital Supply Division and its American V. Mueller Division.

III. THE ACQUIRED CORPORATION

7. American Cystoscope Makers, Inc. (ACMI) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 300 Stillwater Avenue, Stamford, Connecticut. Prior to the acquisition of ACMI by respondent AHSC, American Latex Corporation (ALC) was a subsidiary of ACMI, organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business in Sullivan, Indiana.

8. In 1979 ACMI, including its foreign subsidiaries, had consolidated revenues of approximately $40.2 million and consolidated assets of $27.3 million.

9. ACMI is engaged primarily in the research, development, manufacture, and marketing of endoscopes.

10. ACMI through its subsidiary, American Latex Corporation, is engaged in the manufacture and sale of urological catheters.

IV. JURISDICTION

11. At all times relevant herein, respondent AHSC and ACMI have been and are engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V. THE ACQUISITION

12. On October 10, 1980, respondent AHSC acquired substantially all of the assets of ACMI for approximately $38.5 million, including 100% of the stock of ALC.

VI. TRADE AND COMMERCE

13. For the purpose of this complaint, the relevant product market is the manufacture and sale of urological catheter products and the relevant geographic market is the United States.

14. Urological catheters are comprised primarily of urethral and Foley type catheters used to drain and/or irrigate the urinary bladder.

15. Sales to hospitals of urological catheter products in the United States in 1979 are estimated to have been approximately $70.4 million.

16. Prior to the acquisition of ACMI by AHSC, AHSC and ACMI were actual competitors in the manufacture and sale of urological catheter products. In 1979, AHSC, through its American Pharmaseal Division, ranked approximately fifth in total sales among all urological catheter product manufacturers. AHSC's share of urological catheter products sales is estimated to have been approximately 8.1% and ACMI's share approximately 3.6% in 1979.

17. The urological catheter products market is highly concentrated. In 1979 the four top ranking firms accounted for approximately 82.7% of domestic sales.

VII. EFFECTS OF THE ACQUISITION; VIOLATIONS CHARGED

18. The effects of the acquisition by AHSC of ACMI may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of urological catheter products in the United States in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways among others:

a. Actual competition between respondent and ACMI in the manufacture and sale of urological catheter products will be eliminated;

b. ACMI as a substantial, independent competitive factor in the manufacture and sale of urological catheter products will be eliminated;

c. Concentration in the manufacture and sale of urological catheter products will be increased, and the possibility of deconcentration may be diminished; and

d. Additional acquisitions and mergers in the industry may be encouraged.

Decision and Order

The Federal Trade Commission having initiated an investigation of the proposed acquisition of American Cystoscope Makers, Inc. by American Hospital Supply Corporation, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Hospital Supply Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois with its office and the principal place of business located at One American Plaza, Evanston, Illinois.

American Cystoscope Makers, Inc., was a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 300 Stillwater Avenue, Stamford, Connecticut.

American Latex Corporation was a subsidiary of American Cystoscope Makers, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business in Sullivan, Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent, through its officers, directors, employees, subsidiaries, affiliates, divisions, successors, and assigns, shall within eighteen (18) months from the date on which this order becomes final divest absolutely and in good faith either 100% of the stock of American Latex Corporation (hereinafter "ALC") or all assets, properties, rights, and privileges, tangible and intangible, of ALC, including but not limited to corporate name, real property, plant, equipment, machinery, raw material inventory, product inventory, lists of customers, product trade names, product trademarks, patents, licenses, manufacturing specifications and procedures, marketing materials, sales training materials, research and development projects, and together therewith shall also divest those assets of American Cystoscope Makers, Inc. (hereinafter "ACMI") intrinsically related to the manufacture, distribution, sale, research or development of the products manufactured by ALC including but not limited to copies of all customer lists, records of sales in the previous two years, market projections and surveys, marketing plans and studies, and promotional or advertising materials. Such divestiture shall be made to a third party which represents that it intends to use the assets in the manufacture, distribution or sale of urological catheters in the United States.

II

It is further ordered, That, at the option of the acquirer of the stock or assets of ALC, respondent (including its newly acquired ACMI subsidiary or any successor organization) shall, for a period of one

year from the date of compliance with Paragraph I of this order, purchase from ALC all catheters that respondent purchases during such one year period for resale under any trademark or trade name of ACMI of a type which ACMI obtained from ALC at the time of the acquisition of ACMI by respondent.

III

It is further ordered, That, pending the divestiture required by this order, respondent shall not cause, and shall use its best efforts to prevent, any diminution of the value of the products or assets of ALC and shall preserve ALC as a viable, ongoing business.

IV

It is further ordered, That, pursuant to the requirements of Paragraph I above, none of the assets of ALC shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee, or agent of, or under the control, direction, or influence of, respondent or any of respondent's subsidiaries or affiliated corporations, whether direct or indirect, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of respondent.

V

It is further ordered, That, for a period of five (5) years from the date this order becomes final, neither respondent, nor its subsidiaries, affiliates, divisions, successors or assigns shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire more than one percent (1%) of any stock, share capital, or equity interest in any concern, corporate or noncorporate, engaged in, or any of the assets of such concern relating to, the manufacture, distribution, or sale in the United States of urological catheters.

VI

It is further ordered, That respondent shall, within ninety (90) days after the date of service of this order, and every ninety (90) days thereafter until respondent has fully complied with the divestiture provision of this order, and annually thereafter, for the duration of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent intends to comply, is complying or has complied with this

order. Until divestiture is accomplished, all compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the disposition of the assets or stock specified in Paragraph I of this order, the identity of all such persons and copies of all written communications between such persons and respondent.

VII

It is further ordered, That respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance obligations arising out of this order.

In the Matter of

THE COCA-COLA COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket D. 8824. Decision, Oct. 26, 1976—Modifying Order, June 4, 1981

This order reopens the proceeding and modifies the order issued by the Commission on October 26, 1976, 88 F.T.C. 666, 41 FR 53653, by deleting certain language from Paragraph 1(c) which required respondent to maintain *all* entry forms submitted in games or contests and by adding language limiting the applicability of the recorded retention requirement to games of skill.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Petitioner, The Coca-Cola Company, seeks the modification of a record-keeping provision of the Order to Cease and Desist issued by the Commission on October 26, 1976.

The Order Paragraph in question currently prohibits petitioner from:

> Engaging in, promoting the use of, or participating in any . . . promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:
>
> * * * * * * *
>
> (c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in connection therewith, full and adequate records *including all entry forms submitted by participants therein,* which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative. (Emphasis supplied.)

Petitioner is required by this provision to retain all entry forms submitted in all contests—including games of chance and games of skill—in which it engages. Petitioner requests that the Commission modify the Order by limiting the applicability of this requirement to games of skill. Specifically, petitioner proposes that the Commission delete the underscored language, requiring the maintenance of entry forms, from Paragraph (c), and add a new paragraph requiring the retention of entry forms in connection with games of skill.

The purpose of the requirement that petitioner keep entry forms

submitted in contests in which it engages is to enable the Commission to determine whether contest winners were properly selected and, if not, to identify persons to whom prizes should have been awarded. Thus, the Commission could, at the conclusion of a skill contest, examine the contest entries and evaluate whether petitioner had fairly conducted the promotion and, if not, determine the proper winners of the contest. In the case of a game of chance, however, examination of the entry forms would not provide the Commission with any useful information in determining whether the contest was properly administered or the identity of any injured parties. This is because all entry forms are identical, and winners are chosen at random rather than based on whether the information contained on their entry forms is correct. The maintenance of entry forms submitted in connection with games of chance does not, therefore, serve any useful function. It does, however, impose costs upon petitioner.

The Commission, having considered the Petition, determines that petitioner has made a satisfactory showing that the public interest requires that the Order be reopened and modified as requested. This determination is consistent with the Commission's Order of February 24, 1981, modifying the Order against Glendinning Companies, Inc., in Docket No. 8824 in the same manner as the Commission hereby directs in the instant case.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on October 26, 1976, against The Coca-Cola Company shall be modified by making the following additions (indicated by underscoring the added language) and deletions (indicated by placing dashes over the deleted language) to the Order:

Order

It is ordered, That respondent The Coca-Cola Company, a corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation or other device, in connection with the advertising, offering for sale, sale or distribution of Coca-Cola, Tab, or any food or other product, or in connection with the sale or distribution of "Big Name Bingo", or any other promotional game, contest, sweepstake or similar device which involves or offers the awarding of a prize or anything of value to participants therein, by any means, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Engaging in, promoting the use of, or participating in any such

promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

(a) All of the requirements, terms and conditions for participating therein and for entitlement of such prizes are clearly and conspicuously set forth in each advertisement or notice which purports to explain or illustrate the operation of, manner of participation in, or the basis for or prospects of becoming entitled to or receiving a prize in connection with, any such contest or promotional game.

(b) All such prizes are in fact awarded to all participants therein whose entries conform to the stated requirements, terms and conditions for entitlement to and receipt of such prizes.

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in connection therewith, full and adequate records including all entry forms submitted by participants therein, which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative.

2. Engaging in, promoting the use of or participating in the development or operation of any skill contest unless respondent or its designee maintains for at least two years after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

It is further ordered, That this modification shall become effective upon service of this Order.

345-554 O—82——59

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, June 8, 1981

Denial of respondents' motions to reconsider order of May 15, 1981.

ORDER

Kellogg and General Mills have filed objections to our Order of May 15, 1981. We have reviewed these objections and we find them to be without merit.

Kellogg argues that the statutory requirement for the Office of Personnel Management ("OPM") to appoint an Administrative Law Judge ("ALJ")—that is, that the Commission be "occasionally or temporarily * * * insufficiently staffed with adminstrative law judges," see 5 U.S.C. 3344—has not been met. Kellogg does not specify the relief it seeks based upon this objection. After ALJ Berman withdrew from the supplementary proceedings on November 21, 1979, then-Chief Judge Hanscom, in lieu of appointing another ALJ under Rules of Practice Section 3.42(b), filed a "Certification to Commission of Matter of Appointment of Official to Conduct Proceeding to Supplement Record" on November 27, 1979. Chief Judge Hanscom recited that Judge Berman withdrew because he "concluded that his impartiality might reasonably be questioned and that rulings, findings or conclusions he might make could be subject to the contention that they were influenced by the relative degree of his friendship with [Judge Hanscom], Judge Barnes and Judge Hinkes." Judge Hanscom further reported that, although ordinarily he would appoint a substitute ALJ, "in this instance the factors cited by Judge Berman motivating his withdrawal apply to all the remaining law judges in this office." Kellogg would apparently have us go behind this assertion of the Chief Law Judge and canvass each ALJ individually. We believe, however, that Judge Hanscom's certification is an entirely sufficient record basis for the Commission's conclusion that it is "occasionally or temporarily * * * insufficiently staffed" with ALJ's.

Moreover, Kellogg itself urged the course of action it now challenges. It contended

Additionally, for the reasons stated in Chief Judge Hanscom's memorandum of November 26, 1979, Kellogg contends that no ALJ currently employed by the Commission can properly preside over any further proceedings to supplement the record.

Accordingly, Kellogg recommends that the Commission appoint an ALJ from outside the agency * * * . [Memorandum of Respondent Kellogg Company in Response to the Commission's Order of March 4, 1980, filed Apr. 3, 1980 at 70.]

In addition, our February 13 Order gave notice of our intention to seek the appointment of an outside ALJ. Not only did Kellogg not object, but it filed detailed recommendations on the procedures to be followed. It has given no explanation either for its sudden reversal of position or for its untimely objection, and we perceive none.

Kellogg also objects that under the Commission's Order of May 15, 1981, the new ALJ will file a recommended rather than an initial decision. It misapprehends the nature of the supplementary proceedings we have ordered in this matter. Those proceedings are intended to assure the integrity of the Commission's procedures in this case. The Commission has been, and continues to be, therefore, itself the fact-finder, as is evidenced by the prior orders entered in this collateral inquiry (see, *e.g.*, Orders of November 30, 1979, July 31, 1980, October 9, 1980). Moreover, the factual issues have now been narrowed to one remaining question: "[W]hat actions did any employee of the Bureau of Competition take in the process leading to the contract with former ALJ Hinkes?" (Order of May 15, 1981, at 7.) The recommended decision procedure, expressly authorized by 5 U.S.C. 557, is ideally suited to the role that the Commission has reserved for itself, and we therefore adhere to our earlier determination to utilize that procedure.[1]

Third, Kellogg asks that it be afforded a ten-day period to comment upon and challenge any OPM selection. Insofar as this request asks us to make such a recommendation to OPM as the appointing authority, we decline to do so. The notification and objection procedure that Kellogg now urges is similar, although not identical, to the procedure it proposed for the appointment of an ALJ in its submission in response to our February 13 Order. Under that proposal, we would have requested OPM to prepare a list of up to ten eligible ALJ's, and the parties would have had ten days to object to up to four of the ten ALJ's listed by OPM. We rejected that proposal because it appeared "cumbersome and burdensome for OPM, the Commission and the parties, and could well lead to a substantial delay in the appointment of an ALJ." Order of May 15, 1981, at 3. Procedures already in place assure that proper grounds for disqualification of an ALJ can be heard.[2]

[1] Kellogg also urges that OPM should not appoint an ALJ because of this determination. Our exercise of procedural discretion will ultimately be subject to review in a court of appeals if an order adverse to Kellogg issues in this proceeding. In our view, this determination is not a relevant factor in OPM's appointment of an ALJ pursuant to 5 U.S.C. 3344.

[2] See Rules of Practice Section 3.42(g)(2). Commission determinations of such disqualification motions are of course subject to judicial review, as described in footnote 1, *supra*.

General Mills objects to the appointment process because we did not follow its suggestion that the Commission request OPM to appoint an ALJ of at least five years' experience in presiding over proceedings under rules similar to those of the Commission. Our letter to OPM of May 15, 1981, expressly advised that agency of the nature of the proceeding and the position of respondents in this respect. We see no reason to alter our May 15 determination.

Accordingly, treating the filings of Kellogg and General Mills as motions to reconsider our Order of May 15, 1981, we find them without merit and deny them. *It is so ordered.* The Secretary shall transmit a copy of this order to the Director of OPM.

Commissioner Pertschuk did not participate.

ADVISORY OPINION

Whether any of the laws enforced by the Commission would be violated if a member of UAW served as a director of American Motors Corporation at the same time that another UAW member was a director of Chrysler Corporation. [*United Auto Workers, May 1, 1981*]

Advisory Opinion Letter

May 1, 1981

Dear Mr. Fillion:

On October 9, 1980, on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), and pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, you requested advice with respect to whether any of the laws enforced by the Commission would be violated if a member of the UAW served as a director of American Motors Corporation ("AMC") at the same time that another UAW member was a director of Chrysler Corporation ("Chrysler"). In considering this request for an advisory opinion, the Commission has reviewed the memoranda submitted by the UAW and AMC.

1. Factual Background[1]

The UAW is a labor union that represents employees of automobile manufacturers, including Chrysler and AMC. Pursuant to an agreement between the UAW and Chrysler, Douglas A. Fraser, President of the UAW, was nominated to serve on Chrysler's board of directors and has been a director of Chrysler since May 1980. During 1980 contract negotiations between the UAW and AMC, the UAW presented a demand for participation on AMC's board of directors through a member other than Mr. Fraser. AMC agreed to nominate a UAW member other than Mr. Fraser as a director at its next regular stockholders' meeting. This agreement, however, is contingent upon determinations of "legal acceptability" by the Federal Trade Commission, the Department of Justice, and the Department of Labor.

[1] The facts discussed in this opinion are based upon the materials supplied by the UAW and AMC.

2. Section 8 of the Clayton Act

Section 8 of the Clayton Act prohibits interlocking directorates between competing corporations. In pertinent part, the statute provides that

> no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers . . ., if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

The Congressional intent underlying Section 8 was clearly summarized in one of the first cases to be brought under the statute:

> [A] fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.

United States v. Sears, Roebuck & Co., 111 F.Supp. 614, 616 (S.D.N.Y. 1953).[2]

It has been recognized that "there is no need to assess the nature of the industry or to look at mitigating circumstances. It [Section 8] is a *per se* statute." *Perpetual Fed. Sav. & Loan Ass'n,* 90 F.T.C. 608, 619 (1977) (Initial Decision), *order withdrawn on other grounds,* 94 F.T.C. 401 (1979).

It appears that Chrysler and AMC are competitors, that they satisfy the size requirement contained in Section 8, and that they engage in interstate commerce. Thus, some elements of a violation are present, and the law would be violated if the same person were a director of both companies and if no exemption from the antitrust laws were applicable. This letter, therefore, focuses on the issue of whether the UAW is a "person" within the meaning of Section 8 and, if so, whether it would be a "director" of AMC and Chrysler in the circumstances described in the materials submitted to us and the related issue of whether the labor feature of the arrangement renders Section 8 inapplicable.

Section 1 of the Clayton Act, 15 U.S.C. 12 (1976), defines the term "person" to include corporations and associations. This language is identical to the definition found in the Sherman Act, under which unions have been held to be persons. *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344, 390-92 (1922). There is no case prece-

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[2]*See also* H.R. Rep. No. 627, 63d Cong., 2d Sess. 20 (1914).

dent holding that the same construction is or is not appropriate under the Clayton Act, but it is conceivable that the UAW could be a person within the meaning of Section 8.

The next question is whether the UAW would, for purposes of Section 8, be a director of both Chrysler and AMC in the factual situation presented to us. Specifically, the question is whether Section 8 would be violated since, technically, different individuals would be elected as directors of the two companies and since, in the labor-management context, the concerns to which Section 8 is addressed might not arise.

The basic purposes of Section 8 are to avoid the opportunity for coordination of business decisions by competitors and to prevent the exchange of commercially sensitive information among competitors. The potential harm prohibited by Section 8 has been said to be likely if two individual directors serving on the boards of competing companies are both representatives of a third party. *See* V.P. Areeda & D. Turner, Antitrust Law 374-75 (1980); *see also United States v. Cleveland Trust Co.,* 392 F.Supp. 699 (W.D. Ohio 1974), in which the government took the position that a corporation sat on the boards of competing corporations through representatives or deputies. Although the Department of Justice advanced the deputization theory nearly eight years ago, the *Cleveland Trust* case was settled and there are no decided cases adopting or endorsing that theory.

Because of the absence of decided cases, our views concerning the "deputization theory" must be somewhat tentative. Nevertheless, we believe that a corporation or association may violate Section 8 of the Clayton Act if it has representatives or deputies serving simultaneously on the boards of two competing corporations. However, we do not believe Section 8 was intended to reach interlocking directorates formed through "representatives" of a common labor union. Such a construction of Section 8 would extend its reach beyond the situations which Congress intended to be *per se* unlawful and might preclude particular labor-management relationships which may not present the risk of competitive harm at which Section 8 was aimed. Consequently, we do not believe that Section 8 should be construed to make unlawful the type of labor-management experiment at issue here.

Further, the UAW has made clear in its submission that it intends that the director on the AMC board will function independently and will refrain from sharing confidential commercial information with other union officials, including the UAW director on the Chrysler board. The proposed arrangement arises in the novel context of worker involvement in the affairs of corporate management with expressed aims that do not raise Section 8 concerns. On those facts (and

we believe we are bound to accept the UAW's assertions as factually correct) we do not believe a "representative" relationship for purposes of Section 8 is present.

By direction of the Commission, Commissioner Bailey dissenting.

/s/ Carol M. Thomas
Secretary

Letter of Request

October 9, 1980

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) hereby requests the Commission for advice or interpretation pursuant to Title 16 C.F.R. Part 1, Sub-part A, Section 1.1 through Section 1.4.

Question Presented

1. Whether a UAW member on the board of directors of American Motors Corporation (AMC) violates applicable United States Antitrust Laws under the jurisdiction of the Federal Trade Commission, when a separate UAW member is on the board of directors of the Chrysler Corporation, a competitor of American Motors.

Statutes under Which the Question Arises

The question arises under the following statutes of the United States:

1. Section 8 of the Clayton Act, 15 U.S.C. 19 (1976);
2. Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(d)(1);
3. Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1.

Statement of Material Facts

The UAW is a labor union that represents auto workers employed, among others, by Chrysler Corporation and by the American Motors Corporation. Since May of 1980, Douglas A. Fraser, a member of the UAW, has been a director of Chrysler. During the 1980 contract negotiations with AMC, AMC agreed to nominate a UAW member as a director at its next regular stockholders' meeting (February,

1981) upon determinations of "legal acceptability" by the Department of Labor, the Department of Justice and the Federal Trade Commission, as set forth in a letter from American Motors Corporation to the UAW attached hereto and made a part hereof as Exhibit A.*

As a consequence, and because of the agreement with the American Motors Corporation, the UAW is requesting appropriate advisory opinions of the agencies set forth in the letter of agreement. The antitrust aspects of the matter for which the UAW seeks advice or interpretation involve substantial and novel questions of fact and law, and there is no clear Commission or court precedent. In addition, the subject matter of the request and subsequent publication of Commission advice on this matter is of significant public interest.

In order to assist the Commission in its consideration of this request, the UAW submits the attached Memorandum of Fact and Law in Support of the Nomination of a UAW Member To Serve on the Board of Directors of the American Motors Corporation.*

Copies of this letter, Exhibit A, Exhibit B,* the request to the Justice Department,* and the UAW's Memorandum of Fact and Law are being sent to Richard MacCracken, Vice President, Industrial Relations, American Motors Corporation, 14250 Plymouth Road, Detroit, Michigan 48232.

Respectfully Submitted,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

/s/ John A. Fillion
General Counsel

Philip W. Moore
Law Offices of Philip W. Moore

* Not reproduced herein for reasons of economy.

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